REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2509 OF 1998

NJERU MUKUNDIE…….....…1ST PLAINTIFF

NYAGA MATUMBI…….....…2ND PLAINTIFF

NYAGA MWANGANGE…….....…3RD PLAINTIFF

NICOLAS N. NJERU…….....…4TH PLAINTIFF

[suing for themselves and as representatives of

Mukera Clan of Mbeere]

-VERSUS-

THE HON. ATTORNEY-GENERAL ……...…..…1ST DEFENDANT

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT……....…….2ND DEFENDANT

THE CHIEF LAND REGISTRAR…….....…...…..3RD DEFENDANT

LAMECK GICHANGI sued as Representative

of the NDITI CLAN, MBEERE….....4TH DEFENDANT

NYAGA CIATHATHI also sued as Representative

of the NDITI CLAN, MBEERE….....5TH DEFENDANT

RULING

The fifth defendant moved the Court by Notice of Motion dated 15th February, 2005 and filed on 16th February, 2005. It was brought under Orders L rule 1, I rule 10(2), XXIII rule 2 and XXIV rule 2(1) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21). The substantive prayer was that the 5th defendant be excluded from this suit and proceedings.

The application is premised on the following grounds:

(i) the plaintiff had brought this representative suit against the Nditi Clan through the 4th defendant;

(ii) some members of the clan demanded additional representation by the 5th defendant; and by a consent order made on 13th November, 2001 Nyaga Ciathathi was enjoined as 5th defendant and representative of the Nditi Clan and he did file a defence in that capacity;

(iii) the 4th defendant died on 12th December, 2003 and the suit against him and the clan has since abated;

(iv) it is no longer necessary for the 5th defendant to continue being a party to the suit which has abated as against the 4th defendant in any event, and there was a common defence as between the 4th and 5th defendants.

Supporting evidence is in the depositions of the 5th defendant ***Nyaga Ciathathi***, made on 15th February, 2005. He avers that he is a member of the Nditi Clan of Mbeere, against whom suit had initially been brought through the 4th defendant alone. Some members of the clan had suspicions that the 4th defendant was colluding with the plaintiffs, and so they demanded additional representation by the deponent. It is deponed that when this matter came up before ***Githinji, J*** (as he then was), a consent order was made under which the deponent was made the 5th defendant, also representing the Nditi Clan. It is deposed that the 4th defendant died on 13th December, 2003 and the suit against him *and the Clan* abated. The deponent avers that his advocate has advised him and he believes it to be true advice, *"that in view of the passing away of the 4th defendant who has been sued on behalf of our clan, the suit against both him and our clan has since abated and therefore there is no further reason for me to continue in this suit as a defendant."*

The plaintiffs responded by filing grounds of opposition under Order L, rule 16 of the Civil Procedure Rules. The grounds are as follows:

(a) the applicant as a defendant cannot remove himself from the suit;

(b) the applicant came into the suit by way of a consent order, freely entered into and recorded on 13th November, 2001 — and that order can only be vacated by another consent order and not otherwise;

(c) the applicant is a necessary party to this suit —and more so in the absence of the 4th defendant —to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit;

(d) the prayers sought in the plaint are joint and several as against all the defendants in the suit.

This application was heard on 21st April, 2005 when ***Mr. Meenye*** represented the 5th defendant/applicant while ***Mr. Kimiti*** represented the plaintiffs/respondents.

Mr. Meenye presented the application and the supporting depositions. He restated the fact that not all the members of the Nditi Clan were satisfied with representation by the 4th defendant, and so they demanded and obtained, through consent orders recorded in Court, joinder of the 5th defendant as a joint representative of the clan. I got the impression that joint representation by the 4th and 5th defendants would necessarily entail that if the 4th defendant died, then the entire responsibility was left on the shoulders on the 5th defendant, and vice versa — unless, of course, the clan as an entity applied for and secured its full release as a suitor. I also formed the impression that the 4th and the 5th defendants had stood on the same plane as suitors and as representatives of the Nditi Clan, and neither of the two was superior to the other.

From the foregoing analysis, it can be appreciated that I had difficulties with ***Mr. Meenye's*** reasoning: that if the 4th defendant died, (as he did, in 2003), then the suit against *the clan* must also abate —noting that representative cover must now have shifted from 2 persons (4th and 5th defendants) to just *one* person, the *joint* representative (5th defendant).

Mr. Meenye raised an interesting point: *"The 5th defendant/applicant feels he is no longer a necessary party, because the 4th defendant whose mischief led to joinder of the 5th defendant, is no longer a threat."* What is the merit of this argument? The correct position, I think, is that the question as to *who was the author of the mischief* leading to the suit, is a substantive evidentiary question; it is only knowable when the evidence has been taken. We are not there yet. We are still at the preliminary procedural stage of joining parties; and the names of the 4th and the 5th defendants have been joined. It is of no materiality at this stage whether the mischief occasioning suit emanated from the 1st, 2nd, 3rd, 4th or 5th defendant or any combination of them. Therefore I would not, with due respect, accept that if the mischief-maker was the 4th defendant, and he has died, then the 5th defendant who together with the deceased were the joint representatives of the defendant clan, ceases to be a necessary party; I do not think that in those circumstances the clan would cease to be properly enjoined through a named representative defendant. I think it is not logical to maintain, as learned counsel has sought to do, that the death of the 4th defendant would have, perforce, led to the abatement of the suit which is against the clan alongside the first three defendants.

Mr. Meenye contested the plaintiffs' ground of objection that the Court orders which had enjoined the 5th defendant had been made by consent, and so could not be varied without consent. Counsel contended that the said orders, though reached by consent, were illegal — that they did not comply with order I, rule 10(4) of the Civil Procedure Rules.

Order I, rule 10(4) provides as follows:

"Where a defendant is added or substituted, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendants."

As already noted, the Court made an order reached by consent, on 13th November, 2001. That order, with great respect to learned counsel, cannot be rightly described as illegal; firstly it had the moral force of consent (which is also provided for in law), and secondly the learned Judge expressed that consent as a *formal order of the Court*. It was in every respect legal. It seems, however, that the consent itself made no mention of amendment to summons and plaint, or of the mode of service thereof once amendment was effected. Order I, rule 10(4) like other rules of Civil Procedure, is intended to guide the Court as it dispenses justice. Most of these rules, by their design and purpose, elementally merge into the substance of a matter which the Court is considering on the merits, and it may be difficult for the Court to dispense substantial justice without them being fully observed; but some of them are essentially *directory*, and allow the Court some room for management and interpretation, so that the ends of justice are not defeated. I would hold Order I, rule 10(4) to be in this latter category; and on that basis I will now assess learned counsel's argument.

The substance of the claim before the Court has to do with the *application of the Land Adjudication Act* (Cap 284), and involves *one clan making a claim against another and against ministerial decisions taken more than quarter of a century ago*. All the parties are fully informed of this dispute, and they have taken their positions and filed their pleadings. Both suitor-clans have provided for representative actions, and they have instructed competent counsel to have the conduct of their respective cases. In these circumstances, a just position can, I think, only be arrived at after the respective clan positions are fully ventilated in Court. This, I think, is the principled reference point in this matter, rather than the technical challenge, which learned counsel, ***Mr. Meenye***, has founded on the wording of Order I, rule 10(4).

Learned counsel remarked that while the 5th defendant had been enjoined in the suit, no amendment was

made to the summons and the plaint and no amended papers had been served. Counsel submitted*: "Therefore [the 5th defendant] has been on record unprocedurally and is not a party."* Counsel did note, however, that the 5th defendant had filed a defence, though without him being served. Counsel prayed for a discharge of the 5th defendant *qua* defendant. He cited Order I rule 10(2), which gave the Court power in these terms:

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out …"

I note, however, that, that same provision also states that where the name of a party is thus struck out as a party, the Court may add *"the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit."*

On the facts of this matter, as I have noted already, the crux of the gravamen is in the *conflicting claims of the two clans*. The plaintiff clan is duly represented. The representatives of the defendant clan were the 4th and the 5th defendants. The 4th defendant has died. I would have expected learned counsel to state *who was more appropriate as representative of the Nditi clan than the 5th defendant*, following the death of the 4th defendant.

Mr. Meenye also sought to sustain his client's application on the basis that only the plaintiffs were opposing it – but not the 1st, 2nd and 3rd defendants. The merits of this argument were not obvious to me, as the defendants stand together and they will certainly all benefit by the plaintiffs' claim losing its very substratum and ending up in failure.

Learned counsel, ***Mr. Kimiti,*** for the plaintiffs observed that the 5th defendant *had himself made oral application to be enjoined*, and that is how the consent order of 13th November, 2001 came to be made. On that occasion, the learned Judge had given the 5th defendant 15 days within which to file his defence; and he duly complied, which act, learned counsel submitted, by and of itself made the 5th defendant a party to the suit in hand. Counsel submitted that the joinder of the 5th defendant did not, as such, amount to an addition of defendants, as he only came in as a *representative* of the Nditi Clan; the real defendant was *the clan itself.*

The death of one representative, counsel submitted, did not make the suit abate *as against the clan*; and both the 4th and 5th defendants were sued only as representatives of the clan. Counsel urged that granting the orders now sought would affect the members of the clan, as they would no longer have a representative while they were being sued by the plaintiffs; in which case, under Order I rule 10(2), the 5th defendant was a *necessary party*, to enable the Court to completely and effectually adjudicate and settle all the questions before it. The orders sought by the plaintiffs would affect the Nditi Clan; and so the clan ought to be represented. The matters complained of relate to conduct by the Chief Land Registrar and the Director of Land Adjudication, and any orders made against them would affect the Nditi Clan.

Mr. Kimiti noted that the 5th defendant had been enjoined in the suit by *consent;* and one consent order requires another consent order to reverse it, unless there are grounds to vitiate the consent. No grounds had been given to vitiate the consent; and therefore, in the words of counsel, *"the consent stands and continues throughout*." On 18th June, 1999 the Principal Deputy Registrar had made orders for notice of the suit to be given by advertisement in the press, and for the interested party to enter appearance within a defined period (by virtue of Order I, rule 8(2)), and it is through this authorised route that the 5th defendant came to be enjoined. Now ***Mr. Kimiti*** submitted: *"[The 5th defendant] came in through the law; he cannot just back out. Having filed a defence, he is now estopped from denying that he was served with the plaint. He should be deemed to have been served with the plaint. He is therefore a proper defendant; and prayers are being made against the defendants jointly and severally. If the suit is*

discontinued against one, it will continue against the other defendants."

In his response, learned counsel for the 5th defendant/applicant still doubted the significance of the consent which had led to the Court orders of 13th November, 2001 which had enjoined the 5th defendant. His argument was that one cannot, by consent, confer jurisdiction where it does not exist. This is a problematic argument, because *no one should ever say lightly that the High Court lacks jurisdiction.* This Court is the basic seat of justice where an aggrieved party from anywhere should come and present his or her grievance, and this is quite consistent with the provision of s.60(1) of the Constitution: "**There shall be a High Court, which shall be a superior Court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."** There is *no general class of matters that lies outside the High Court's jurisdiction*, save that Parliament may define or restrict such jurisdiction in respect of a special, identified matter here and there if need be — and by statute. Learned counsel has not convinced me that on this question of enjoining the 5th defendant as a party, there was such an exceptional circumstance statutorily defined, which had in any way limited the expansive jurisdiction of the High Court. I think counsel's contention in that regard, is one that is rather strained.

Again learned counsel contended: "*The suit having abated as against the defendant, no suit exists, or is capable of existing as against the 5th defendant who is improperly enjoined as the Court had no jurisdiction*". Two arguments are wrapped in here: firstly the challenge to the Court's jurisdiction, which I have already stated I would not accept; and secondly the claim that the suit has abated. I think the suit is claimed to have abated against the Nditi clan because of the death of the 4th defendant. This claim, with much respect, is a specious one. For the target of the suit is not the 4th or the 5th defendant; it is the ***clan***, which remains alive. The death of one representative, the 4th defendant, left another representative, the 5th defendant, alive. Therefore, the 5th defendant alone is now left as the representative in the suit, of the Nditi clan. The scenario is an entirely regular one, in terms of legal form and legal reasoning, as I see it.

From my analysis, which runs through the body of this ruling, it is clear that I think the consent order made by ***Mr. Justice Githinji*** on 13th November, 2001, on the basis of which the 5th defendant was joined as a party, was a *genuine consent* freely entered into between the parties and their respective counsel, and the order was in every respect a valid expression of the wide jurisdiction enjoyed by the High Court. Within the framework of the Land Adjudication Act (Cap.284) the Nditi clan had been sued in the manner prescribed; and given the nebulous shape of a clan group, Order I rule 8 had been properly applied as the basis for representation in the suit by *specific, named persons*. This is how both the 4th and 5th defendants were named as defendants; but it should be clear that the two were not being sued in their personal capacities, they were the representatives of the Nditi clan. It then follows that such representation could have been provided by either the 4th defendant alone or by the 4th and 5th defendants. The Nditi clan itself asked for representation by the two, and the matter was agreed to in a formal consent order made by the Court. It follows that the suit, which is against the clan and the clan still survives, cannot abate because the 4th defendant has died. The clan's representative now remains one, namely *the 5th defendant*. And by the principle of joint responsibility, the death of the 4th defendant automatically shifted the full burden of representation to the 5th defendant. It follows that the 5th defendant is a necessary party, in whose absence the Court would be unable to completely and effectually dispose of the suit.

That the Nditi clan recognise the 5th defendant as their representative, and that the 5th defendant accepts his role of representation, is demonstrated by the fact that he did duly file a statement of defence, on behalf of the clan. The Court will not act in vain by requiring now that amended summons and plaint reflecting the consent orders of 13th November, 2001 be served upon the 5th defendant. It is to be deemed that he is and always has been properly served, and is a defendant in the present suit representing the Nditi clan.

Consequently, I dismiss the 5th defendant's application by Notice of Motion of 15th February, 2005 with

costs to the Plaintiff in any event.

I also direct that the parties shall take hearing dates for the suit, and the same shall be given on the basis of priority.

Orders accordingly

DATED and **DELIVERED** at Nairobi this 3rd day of June, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.,

Court Clerk: Mwangi

For the 5th Defendant/Applicant: Mr. Meenye, instructed by M/s. Meenye & Kirima Advocates

For the Plaintiffs/Respondents:

Mr. Kimiti, instructed by M/s. P.S.K. Kimiti Advocates