



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

CIVIL SUIT 1307 OF 2003

JOE NJUGUNA WAKABA

FRANCIS MUCHANGI

[suing on their own behalf and)

on behalf of 64 other members)

of Embakasi Village Tenant)

Welfare Group]).....PLAINTIFFS/APPLICANTS

VERSUS

KENYA AIRPORTS AUTHORITY.....DEFENDANT/RESPONDENT

RULING

The plaintiffs' plaint of 30th November, 2004 was filed together with their application by Chamber Summons which was brought under Orders I, rule 8 and XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act.

The plaintiffs seek —

- (i) leave to prosecute their suit on behalf of the 64 persons whose names are annexed;
- (ii) a temporary injunction against the defendant, its servants, agents and/or employees restraining them from evicting, harassing or otherwise interfering with the plaintiff's possession of their houses situated within the Embakasi Village Housing Estate pending the hearing and determination of the suit;
- (iii) that costs be provided for.

The application is grounded on the premises that the plaintiffs' claim against the defendant is the same; and that the defendant is continuously harassing the plaintiffs, with a view to evicting them.

Evidence in support of the application is in the affidavit of **Joe Njuguna Wakaba** and **Francis Muchangi** sworn on 30th November, 2004. Quite strangely, this is a case in which *two different persons have purported to swear one and the same affidavit*, this being drawn and filed by advocates and also witnessed by a Commissioner of Oaths. I will consider this aspect of the affidavit more carefully further on.

The two deponents state that 64 other persons have authorised them to plead on their behalf and to represent them in the suit, and that they are competent to swear this affidavit. They say the plaintiffs and intending plaintiffs are all tenants and occupants of housing units within the Embakasi Village Housing Unit, and that the cause of action is similar for themselves and for the said 64 persons. They state that it is convenient for the Court and the parties to be represented by the two. They aver that no prejudice will be occasioned to any person by a grant of orders to prosecute the suit as a representative action.

They aver that they derive rights of occupation and/or tenancy over the subject houses from the City Council of Nairobi which is the owner of the said houses. The deponents aver that the defendant has been harassing them with a view to evicting them from their habitations. They aver that on 26th November, 2004 the defendant through its agents or servants sought to evict the applicants, and in the process removed doors from four of the subject houses.

They state that on 30th November, 2004 the defendant went to the plaintiffs' houses for the purpose of evicting them. The plaintiffs aver that the defendant in its impugned actions is purportedly enforcing this Court's decree issue in HCCC No. 1661 of 1998 (consolidated with HCCC No. 1683 of 1998), which decree is not applicable to the plaintiffs as they had appeared only as interested parties, while the decree is against the two plaintiffs. The deponents say that in the purported enforcement of the said decree, the defendant is assisted by the Officer Commanding the Embakasi Police Station. They plead that the defendant, unless restrained by the Court, will evict the plaintiffs from their abode.

The defendant filed its statement of defence on 10th January, 2005 and the replying affidavit of **John Joseph Titoo**, its Manager in charge of Legal Services, on 31st January, 2005. He depones that the matters relating to the suit are within his personal knowledge, as he has been dealing with them in the course of his duties. He deposes that the plaintiffs do not derive any right of occupation of the subject premises from the City Council of Nairobi — as the Council is not the owner of the 66 houses within the Embakasi Village Housing Unit and thus cannot confer the alleged rights upon the plaintiffs.

He avers that the subject houses are the property of the defendant, and they are only some of the houses erected on the defendant's parcel of land known as L.R. No. 9042/667. He depones that the City Council of Nairobi has never been the owner of the 66 housing units in the Embakasi Village Estate; and besides, the City Council of Nairobi, in a case between itself and the defendant, in HCCC No. 1683 of 1998, relinquished all rights, title and interest in and to the said L.R. No. 9042/667. The deponent avers that the subject-matter in this dispute is the same as the subject-matter in dispute in HCCC No. 1661 of 1998 (consolidated with HCCC No. 1683 of 1998).

The deponent deposes that HCCC No. 1661 of 1998 (consolidated with HCCC No. 1683 of 1998) was instituted as a representative suit on behalf of the tenants and/or lawful occupants of the Embakasi Village Estate — and hence the plaintiffs herein were also parties in the former suit. It is further deponed that the Court's decree in HCCC No. 1661 of 1998 (consolidated with HCCC No. 1683 of 1998) ordered vacant possession to be given to the defendant by the plaintiffs and each of the persons on whose behalf they are now bringing suit. It was deposed that the said decree is applicable to the plaintiffs and all tenants or occupants of the Embakasi Village Housing Estate by virtue of the representative suit in HCCC No. 1661 of 1998 (consolidated with HCCC No. 1683 of 1998).

Mr. Njaramba representing the plaintiffs contended that the defendant was at fault, from a legal standpoint, in attempting to enforce a decree evicting the plaintiffs when there was no Court order authorising such action. The order which exists and upon which the defendant relies, counsel contended, is an order against other persons than the plaintiffs and so they are not thereby bound. He argued that the plaintiffs in the present suit were not the plaintiffs in the earlier suit. In the words of learned counsel:

“The defendant has no claim in relation to the suit premises and so cannot evict the plaintiffs. The plaintiffs are tenants of the Nairobi City Council...; there is no link between them and the defendants”.

Learned counsel stated that the plaintiffs live in the suit premises with their families, and if eviction

continues, they will suffer irreparably; and that on this account the Court should grant the prayer for an injunction against the defendants.

Mr. Njaramba contested the defendant's position that the instant suit is res judicata; on the ground that the plaintiffs herein were not plaintiffs in HCCC No. 1661 of 1998; after the filing of that suit, leave had not been granted to enjoin the current plaintiffs, and it was not a representative suit.

Learned counsel urged that the plaintiffs had met the requirements for the grant of injunction, and no prejudice would be caused by this suit being made a representative suit. It was urged that the plaintiffs stood to suffer irreparable damage if an order of injunction was not granted.

Learned counsel for the defendant, **Mr. Mukoma**, made his submissions on the basis of three matters: (i) representation; (ii) res judicata; (iii) injunctive relief.

Representative Suit

Learned counsel submitted that the authority of the Court, under Order I rule 8 (1), (2) and (3) was a condition for proceeding as a representative suit; and no such authority had been given in advance before suit was commenced. The High Court has clearly stated in **Wanjiru v. Standard Chartered Bank of Kenya Ltd. and Others** [2003] 2EA 701 that **"Order I, rule 8 of the Civil Procedure Rules is applicable where a plaintiff brings a representative action. A representative action should have leave of Court and/or direction at the time of being filed"** (Mwera, J).

Learned counsel noted that when counsel for the plaintiffs had appeared before Ransley, J on 30th November, 2004 he had refused to allow the plaintiffs to proceed by representative action; and consequently the plaintiffs had now brought and were pursuing their claim without the required authority. Remarkably, counsel for the plaintiffs had not volunteered this information, and merely urged that *"no prejudice will be caused by this suit being made a representative suit."* I would here record my objection to the conduct of counsel for the plaintiffs in this matter, as I cannot see why he did not seek review or appeal against the order of 30th November, 2004. On that occasion Justice Ransley had recorded:

"The plaintiffs do not appear to have a prima facie right to remain in the suit premises..." and he did not grant the orders prayed.

Res Judicata

The defendant annexed to its reply dossier copies of the pleadings in HCCC No. 1661 of 1998, the plaint of 27th July, 1998, defence and counterclaim, and the defendant's Chamber Summons of 14th May, 1998. The headings of those papers show the present plaintiffs as Interested Parties (suing on their own behalf and on behalf of Embakasi Village Tenant Welfare Group). Counsel noted that the recitals to the decree in HCCC No. 1661 of 1998 referred to the plaintiffs, who are still plaintiffs in the instant matter. The plaintiffs were represented at the said suit (HCCC No. 1661 of 1998), and counsel submitted that if they were aggrieved by the decree, then they should have filed under that suit an application for review, or an appeal.

The subject-matter in that suit was: delivery-up of the residential houses — which are still the suit premises in the instant matter. Counsel submitted that as the Court which decided the earlier case was a Court of competent jurisdiction, it followed, by virtue of s. 7 of the Civil Procedure Act (CA.21), that the current suit is res judicata. The plaintiffs cannot dissociate themselves from HCCC No. 1661 of 1998.

For that proposition, learned counsel cited the persuasive authority, **Lotta v. Tanaki & Others** [2003] 2 E.A. 556, a decision of the Court of Appeal of Tanzania:

"The suit property was at one time in the occupation of the appellant's mother and sister, giving all three a common interest therein. Since the appellant's mother and sister had sued on the same subject-matter, the appellant could not be dissociated from that litigation but was to be

deemed to claim under his mother for the purposes of section 9 of the Civil Procedure Code. Accordingly, the appellant's suit was barred by res judicata.

Prayer for Injunction

Counsel submitted that the rules governing the grant of interlocutory injunctions are well settled, and he relied on the case, ***Aikman v. Muchoki*** [1984] KLR 353 where it is stated that the conditions for the grant of an interlocutory injunction are:

- (a) the probability of success of the applicant's claim;
- (b) the likelihood of irreparable harm which could not be compensated for by damages;
- (c) if in doubt the Court should decide the matter on the balance of convenience.

Counsel submitted that the averment made for the plaintiffs that the defendant was evicting them from the suit premises was a mere claim, without any evidence to support it, and besides, no proof had been tendered that the plaintiffs were tenants of the City Council of Nairobi. Counsel observed that the plaintiffs did not even seem to have the reference particulars of the suit premises which they claimed entitlement to; and that the plaintiffs had not shown how they came to occupy the suit premises. In these circumstances, the plaintiffs had not demonstrated probability of success in their claim — and so there was no basis for granting them an injunction. They had also not shown that a monetary award would not fully satisfy them in the event they won in their suit; and the balance of convenience test also would not favour them given the earlier decisions of the Court which favoured the defendant.

Counsel gave examples among the current plaintiffs, showing that, indeed, they had been parties to the proceedings in HCCC No. 1661 of 1998: ***Francis Opiyo*** (Pl No. 49) now appearing as Pl. No. 3; ***Stephen Irungu Mwangi; Joseph Irungu Mwangi***, etc. Counsel noted that there were 15 of the current plaintiffs who were also plaintiffs in HCCC No. 1661 of 1998. All of them appear in the list of Interested Parties in HCCC No. 1661 of 1998. In these circumstances, counsel submitted, this suit was an attempt to continue litigation that had been concluded in the past. Counsel submitted that the plaintiffs had refused to move out of the suit premises after Court orders had been issued against them — and they, as wrongdoers, were estopped from prosecuting a new case. Counsel relied on ***Kibutiri v. Kenya Shell Ltd*** [1981] KLR 390 in which ***Cotran, J*** held (pp.390 – 91):

“The applicant is clearly not a protected tenant but a licensee as the operative agreement is clear; he therefore has not established a prima facie case with a probability of success.”

Mr. Njaramba sought to explain the fact that his client's matter has reached this stage without the Court's grant of authority to prosecute a representative action by stating that:

“This matter has not proceeded at all; therefore Order I rule 8 has not been breached, and we are trying to regularise and proceed with the suit.”

I would doubt whether the contention is a credible one noting, firstly, that ***Justice Ransley*** had on 30th November, 2004 doubted the existence of a *prima facie* case and had not granted the orders now sought; and secondly I see that a plaint has already been filed, and an application is now being prosecuted within the framework of that suit. Is it true that there is no case yet, and that it is proper at this stage to prosecute an application seeking to sue in a representative suit? I would doubt it.

Mr. Njaramba argued that the case, ***Wanjiru v. Standard Chartered Bank of Kenya Ltd & Others*** [2003] 2 E.A. 701 which stated that Court orders were necessary to give authority for a representative suit, was inapplicable because the facts in that case are different from those in the instant matter. He stated that the position taken by ***Ransley, J*** on 30th November, 2004 was in respect of a prayer for a certificate of urgency rather than of a prayer for authority to prosecute a representative suit. The learned Judge had refused to grant a certificate of urgency, and he had recorded his reservations regarding the *prima facie*

cogency of the prayers.

I would, with respect, not agree with such a contention. The application now before me is the very same one which came before Ransley, J. He saw no prima facie merits in the totality of the application, and declined to give any orders. **Mr. Njaramba** argued that the persuasive authority in **Lotta v. Tanaki**, which had held, in effect, that the appellant had been so intimately connected with a previous Court decision as to be incapable of denying association with the orders there made, was not applicable to the circumstances of the plaintiffs in the instant case because they were not plaintiffs in the earlier case, HCCC No. 1661 of 1998. It is not clear what significance learned counsel intends should be attached to the technicality which he raises. There is clear evidence in the annexures to the replying affidavit, that at least 15 of the parties in the instant matter were suitors if not Interested Parties in HCCC No. 1661 of 1998 — a suit which turned on precisely the same suit premises which are now in question.

I would find as a fact that all the persons on whose behalf the plaintiffs are now seeking to sue, did indeed become closely involved in the proceedings in HCCC No. 1661 of 1998, and thanks to that connection, *they were aware, at the very least, of the orders of the Court made in that earlier decision.* It is not, therefore, a serious contention that the persons sought to be represented in the instant suit, are entirely innocent strangers to HCCC No. 1661 of 1998. I would, therefore, agree with counsel for the defendant that the plaintiffs are not coming to Court with clean hands and so cannot be the beneficiaries of interlocutory orders of injunctive relief.

I have to raise *suo motu* one disturbing aspect of the applicants' case which, by itself, would justify striking out the Chamber Summons of 30th November, 2004. This application is founded on the joint depositions of two different persons. Did the two have identical perception on each and all the facts deposed? That cannot be. So, were they saying the whole truth when they swore their affidavit? This is doubtful. Let us suppose that it became necessary to cross-examine the deponent: who would be cross-examined, the first or the second deponent, or both? If both, what would happen if they contradicted themselves?

I would state as a *matter of law that the swearing of an oath in Court is always an individual affair*, and the deponent takes responsibility which is enforceable under the law relating to perjury as an identifiable individual. The requirements of truth in a sworn statement cannot be reconciled with the negotiated or rehearsed avowals of a group whether of two or more individuals.

Order XVIII rule 2 of the Civil Procedure Rules is clear that the contents of an affidavit are confined to such facts as the deponent is able of his own knowledge to prove; and by rule 5 an affidavit is required to be sworn *in the first person*. I believe it should have been specified in the Civil Procedure Rules that an affidavit must be sworn *in the first person singular*; as only in this way is a commitment placed upon the deponent to say the truth.

So important, I believe, is this matter of *individual swearing* of affidavits that, I must declare the joint affidavit of the plaintiffs in the instant matter to be an unreliable evidentiary basis for the application. Indeed, it can be said in broad terms that the affidavit in question is a scandalous one. On that account I must strike out the affidavit, and the consequence is that the plaintiffs' application of 30th November, 2004 has no foundation of supporting evidence and must be struck out, which I hereby do. In every direction, therefore, the plaintiffs' application fails. I will make the following Orders:

- 1. The plaintiffs' prayer that they be granted leave to prosecute their suit on behalf of some 64 named persons, is refused.***
- 2. The plaintiffs' prayer that a temporary injunction do issue against the defendant, its servants, agents or employees restraining them from evicting, harassing or otherwise interfering with the plaintiffs' possession of their houses situate within the Embakasi Village Housing Estate, pending the hearing and determination of the suit, is refused.***
- 3. The plaintiffs shall bear the costs of the instant application in any event.***

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

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs/Applicants: Mr. Njaramba, instructed by M/s. Njaramba & Co. Advocates

For the Defendant/Respondent: Mr. Mukoma, instructed by M/s. Nyiha, Mukoma Advocates.