



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 169 of 2004**

OLE UNUA OLE KONKEI & OTHERS.....PLAINTIFFS

VERSUS

SUKEI OLE NKOYIEI1ST DEFENDANTS

CHAIRMAN ADJUDICATION COMMITTEE

TRANSMARA KIMINDET.....2ND DEFENDANT

DISTRICT LANDS REGISTRAR

(TRANSMARA DISTRICT).....3RD DEFENDANT

COMMISSIONER FOR LANDS.....4TH DEFENDANT

RULING

The plaintiffs herein filed an application under Order XXXIX Rule 1 & 2 of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act seeking an order of injunction to restrain the first defendant from alienating, disposing of, wasting or in any way dealing with a property known as **TRANSAMARA KIMINDET D/1280** and to restrain the third and fourth defendants from receiving and accepting for registration any conveyance executed by the first defendant in respect of the said land in favour of any person.

Before the said application was heard, the first defendant raised a preliminary objection on the locus of the plaintiffs to bring this suit and asked the court to strike out the entire suit. Mr. Kahiga, who held brief for Mr. Musembi for the first defendant submitted that the provisions of Order I Rule 12 of the Civil Procedure Rules which were mandatory had not been complied with. The first plaintiff had stated that he had been authorised by the other plaintiffs to swear the affidavit in support of the application as well as the verifying affidavits that accompanied the original plaint and an amended plaint that were on record. Order I Rule 12 states as follows:-

“(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

Mr. Kahiga further submitted that there was no evidence that the other plaintiffs were aware of this suit. He therefore urged the court to hold that the suit was incompetent and strike it out. He cited several authorities in support of his submissions and I will refer to them in due cause.

Mr. Oduor for the plaintiffs opposed the preliminary objection and said that the verifying affidavit clearly showed that the first defendant had authority from the other plaintiffs to swear the affidavit as he had stated so under oath. He said that the nonexistence of the said authority by the other plaintiffs did not in itself render the suit incompetent and added that the court could exercise its inherent power to allow the other plaintiffs to file their verifying affidavits or authority. He urged the court not to take the drastic action of striking out the suit as prayed by the defendants as the first plaintiff had also filed the suit on his own behalf.

There are about 18 plaintiffs as per the amended plaint. It is not in dispute that only the first plaintiff swore a verifying affidavit. Although he stated therein that he had sworn the affidavit with authority of the other plaintiffs, there was nothing in proof of that. In my view, the issue for determination is whether the aforesaid averment by the first plaintiff satisfies the express requirements of Order I Rule 12(1) and (2) as quoted herein above. To me, that provision of the law is clear beyond peradventure. Where there are more than one plaintiffs or defendants and one of them can appear, plead or act on behalf of himself and the others but he must be authorised by the others in writing and that authority must bear the signature or thumb print of the other parties and must be filed at the time of filing the suit. That is a mandatory requirement which a court of law cannot overlook. Mr. Kahiga cited the case of JOHN KARIUKI & 347 OTHERS VS JOHN MUNGAI NJOROGI & OTHERS Civil Suit No. 152 of 2003 at Nakuru where my brother, Kimaru J, commenting on the aforesaid Rule 12 stated as follows:-

“The mischief that the said rule was meant to address, in my humble view, is to prevent a situation where a party becomes bound by a court decision without him having any knowledge of the suit that led to the said decision.”

I agree entirely with the above holding. The plaintiffs should have either filed their individual verifying affidavits or signed and filed the appropriate authority empowering the first plaintiff to act on their behalf.

What then should be the fate of this suit in light of my aforesaid holding? Is the entire suit bad in law and beyond resuscitation or is there anything which can be done to breath fresh life into it? In D.T. DOBIE & CO. (K) LTD VS MUCHINA [1982] K.L.R.1 Madan JA held that the court should aim at sustaining rather than terminating a suit and that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.

In MICROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LTD & ANOTHER 2001 [KLR] Rengera J (as he then was) stated as follows:-

“Rules of procedure are the hand maidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue.”

In this particular matter, the preliminary objection that was properly taken, was raised at the earliest opportunity before any substantive hearing of the case or the application for injunction was done. It would not be in the interest of justice to strike out the suit while curative measures can be undertaken to remedy the situation.

In that regard, I direct that the appropriate authority of all the other plaintiffs apart from the first plaintiff as required under Order I Rule 12(2) of the Civil Procedure Rules be filed and served within the next **fourteen (14) days** from the date hereof failing which the entire suit shall stand struck out with costs. The plaintiffs shall bear the costs of this application.

DATED, SIGNED AND DELIVERED at Nakuru this 16th day of September, 2005.

D. MUSINGA

JUDGE

16/9/2005

Ruling delivered in open court in the presence of Mr. Musembi for the first defendant and **Mr. Oduor for the plaintiffs.**

D. MUSINGA

JUDGE

16/9/2005