



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 120 OF 2001**

**ELIUD MATHIU**

**JOHN BOSSE**

**PATRICK MUIRURI**

**J K MUTHONDU..... PLAINTIFFS**

**VERSUS**

**GARETH GEORGE**

**PETER NYAKIAMO**

**EARNEST SAINA**

**KIRINYA MWENDIA**

**ALBERT MWENDA**

**KENYA COMMERCIAL BANK LTD**

**KENCOM HOUSE LIMITED..... DEFENDANTS**

**RULING**

Four plaintiffs, Eliud Mathiu, John Bosse, Patrick Muiruri and J K Muthondu through their advocates Messrs Waweru Gatonye & Company suing Gareth George, Peter Nyakiamo, Earnest Saina, Kirinya Mwendia, Albert Mwenda, Kenya Commercial Bank Ltd & Kencom House Limited filed this suit by way of a plaint on 30th January 2001. As is the requirement the same plaint was accompanied by a verifying affidavit sworn by Eliud Mathiu. Together with the same plaint was chamber summons under order 39 rules 1, 2 and 3, order 1 rule 8 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, Chapter 21 and all other enabling provisions of the law. This was brought under certificate of urgency. Parts of the same chamber summons application were dealt with on 30th January 2001 in that interim orders were granted that day in respect of prayers 2,3 & 7.

The *inter parte* hearing of the application was then fixed for 14th February 2001 but on that day it was adjourned to 5th March 2001. On 9th February 2001, the respondent filed a notice of preliminary objections raising several preliminary matters one of which is that the plaintiffs have no *locus standi* to institute the present suit either on their own behalf or on behalf of any other person or persons. When the chamber summons came up before me for hearing the parties agreed to submit on the preliminary

objections first and at that time, Mr Mohamed Nyaoga for the respondents abandoned all the preliminary objections except one and that is the first objection namely that the plaintiffs have no *locus standi* to institute the present suit either on their own behalf or on behalf of any other person or persons. If I understood him well, he contended during the hearing of this objection that even though the plaintiffs would on their own have instituted such a suit against the defendants, however this particular suit is a representative suit and as the plaintiffs had not obtained leave of the Court to institute it, they lack *locus standi* to institute it as a representative suit. He cited order 1 rule 8 and several authorities in support of his submissions.

Mr Gatonye, the learned counsel for the plaintiffs maintains that the preliminary objection is misplaced and misconceived and arises from misappreciation of the law and lack of appreciation of the impact of the plaintiff. According to Mr Gatonye, under order 1 rule 8, the plaintiffs do not need leave to institute a representative suit and the authorities cited in support of the same contention are not relevant to the issues before the Court. He also referred me to one authority and maintained that the authority required is only authority to appoint certain persons to be the defendants. In this case, he contended, the defendants were known and can be sued as a body corporate since they are trustees and are thus known. According to Mr Gatonye, the requirement for permission is only for the Court to authorize the defendants to defend, but there is no prior leave required for purposes of instituting suit by one or more persons. In this case Mr Gatonye submitted, the plaintiffs are suing in their own right as well as suing in their representative capacity. He ended up his submissions stating that preliminary points can only be raised on uncontested facts but in this case, there is still the question of whether the plaintiffs are members of the Pension Fund or not and there are matters that are contested which will require evidence to be taken. That being the case preliminary objection cannot be raised on the same.

I have perused the plaintiff, the defence, the chamber summons, the affidavits the authorities and I have also considered the able submissions by the learned counsels. I think the issues before me to decide are mainly three and these are first whether the preliminary point is raised on matters that are contested, secondly, if I find that the matter upon which the preliminary point is raised is not contested, then whether this suit is a representative suit or not and lastly whether order 1 rule 8 requires the plaintiffs to have leave of the Court to institute the suit. It is in my mind not in dispute that no leave of the Court was applied for and obtained before the suit was instituted.

On the first question of whether matters of facts are conflicting in this suit, as regards the capacity of the plaintiffs Mr Gatonye contends that there is the question of whether the plaintiffs are suing as individuals or as representatives or as both and that has to be ascertained by evidence.

Mr Gatonye has in his submissions submitted that the plaintiffs are suing in their own right and also in their representative capacity. That in itself means to me that they are also suing in their representative capacity as Mr Nyaoga contends. Further a look at paragraph 7 of the plaintiff shows that much as the plaintiffs are claiming to be members/contributors to the Pensions Fund, they are also the elected interim officials ie chairman, secretary, treasurer, and organizing secretary of the KCB Pensioners Association, which is in the process of being formed. Paragraph 17 of the plaintiff also talks of plaintiffs and other members of the Pension Fund and finally on that, a look at the verifying affidavit at paragraph 2, the first plaintiff is swearing that verifying affidavit stating that he is the interim chairman of KCB Pension Association (in formation) and that he has been duly authorized by the other plaintiffs to swear the affidavit. It appears to me clear that whereas their capacity to sue as individuals may be subject to the question of whether they are members of the Pensions Fund or not, the fact that they are suing as chairman, secretary, treasurer, and organizing secretary of the KCB Pensions Association (in formation) is not in dispute between the parties. That is the aspect which is attracting the preliminary objection before me.

The next point to consider is whether the suit is a representative suit or not. I have already held above that from the reading of the plaintiff paragraphs 7 and 17 as well as the verifying affidavit, it is clear that this is a representative suit. I feel this stand is supported by paragraphs 3, 4, 18, 21, 25, 26, 33 and 36 of the affidavit sworn by Eliud Mathiu on 30<sup>th</sup> January 2001 as well as the letters dated 17<sup>th</sup> November 2000, 1<sup>st</sup> December 2000 which are addressed to the Chief Executive, Kenya Commercial Bank Limited by the

Chairman, Interim Committee KCB Pensions Association (in formation). These letters are on the KCB Pensions Association (in formation), letter heads and are written by the chairman of the same association. In the letter of 17th November 2000, he says they who were the undersigned were acting on behalf of 551 pensioners who are members of KCB Pension Fund. In the letter dated 1st December 2000 again written by the Chairman of the Interim Committee KCB Pensions Association, the same Chairman is threatening that they would take legal action to stop the Chief Executive from committing illegal acts complained of. The responses to these letters are all to the Chairman of the KCB Pensions Association (in formation). It is therefore clear to me that this is a representative suit. The applicants accept that much only that they say that the plaintiffs are also suing on their own right. My feeling is that even if that were so, the requirement of instituting a representative suit must still operate in so far as it is accepted as is here by both parties that the suit is being brought on behalf of other unnamed interested parties for the benefit of others not named in the plaint.

That takes me to the last point and that is order 1 rule 8 applicable to the plaintiffs ie is it a necessity that the plaintiffs should also apply for and obtain leave before instituting such a representative suit. Mr Gatonye submits that order 1 rule 8 does not require the plaintiffs to have leave to file a representative suit. According to Mr Gatonye, order 1 rule 8 only requires the plaintiff to have leave to sue a selected number of defendants and that situation is not relevant here as in this case the defendants are trustees of the Kenya Commercial Bank Pension Fund and are therefore clearly identifiable and have been sued as such, so that all that is necessary is the advertisement to all members and contributors to the scheme as is required by the provisions of order 1 rule 8(2).

Order 1 rule 8 states as follows as a whole:

“8(1) where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the Court to defend in such suit, on behalf of or for the benefit of all persons so interested.

(2) The Court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the Court to be made a party to such suit.”

This provision seems to me not to have stated specifically and unequivocally that the plaintiffs must have permission of the Court to sue. All it states as I can read is that where there are numerous persons having the same interest in one suit one or more of such persons may sue. It is when it comes to defending that it states that the Court may authorize one or more persons having interest to defend the suit on behalf of others. It also requires the plaintiffs to give notice to all interested parties of the action the plaintiff has taken and allows other interested parties to apply to be made a party to such a suit. I have perused the case of *Johnson vs Moss and others* [1969] EA 654. That case was based on the provision of order 1 rule 8 in the Uganda Civil Procedure Rules. That provision in the Uganda Civil Procedure Rules is different from what would be a similar provision in Kenya. At page 657 of that case (*Johnson vs Moss & others supra*) where the provision in Uganda is quoted, it seems to me that it clearly stated in that Civil Procedure Rules that Court's permission is a prerequisite. That provision is quoted in the *Johnson* case and is as follows:

“(1) Where there are numerous persons having the same interest in one suit, one or more such persons may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court may in each case direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to be made a party to such suit.” (underlining supplied)

Apart from the difference in arrangement ie where in order 1 rule 8 in Uganda subrule 1 is merged with subrule 2, all other provisions are the same except two. These are first that in the Uganda Rules the phrase “with the permission of the Court” is included whereas in the Kenya Rules that very important phrase is missing. Secondly in the Uganda Rules it is the Court which gives notice of the institution of such suit to all persons interested whereas in the Kenya Rules the Court directs the plaintiff to give notice of the institution of the suit.

A look at the *Code of Civil Procedure* by D F Mulla, 12th Edition volume 1 reveals that order 1 rule 8 as appears there is similar to the Uganda Rules except that there the Court gives notice to the interested persons at the expense of the plaintiff which in my mind is the same as the Uganda Rule for it goes without saying that even in the Uganda Rule the Court cannot issue such notice without the plaintiff(s) paying. In the *Mulla’s Code of Civil Procedure*, order 1 rule 8 states as follows:

“Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefits of all persons so interested. But the Court shall in such case give, at the plaintiffs expense, notice of the institution of the suit and all such persons either by personal service or, where for the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the Court to be made a party to such suit.”

It seems to me clear that Kenya Civil Procedure Rules on the requirement of permission to be given to the plaintiff to sue in a representative suit represents a departure from both *Mulla’s Code of Civil Procedure* and the Uganda Rules.

I do agree with Mr Nyaoga that the purpose of requiring the plaintiffs to get permission to sue is a noble one in that one or two persons should not just on their own constitute themselves representatives of others, sometimes even without consent of those others. The Court should be able to control such a situation and to ensure that people filing suits on their own behalf and on behalf of others are in a way controlled and to ensure that numerous cases are not brought to the Court, but the intention of the Kenyan Rules in departing from the others in such a vital aspect must have been to rely mainly on the notice given to all would be plaintiffs to ensure that if no consent was given to the plaintiffs by such interested persons then such interested persons would object to the suit being filed on their behalf by the plaintiff. In my humble opinion, if the legislature wanted to have permission given to the plaintiffs before instituting a representative suit nothing would have been easier than to follow *Mulla’s Code of Civil Procedure* as was apparently followed in Uganda. Our procedure clearly provides that the Court has to authorize defendants in such a case to defend on behalf of others. What would have been easier than to state that the plaintiffs are also required in such a suit to have permission to institute such a suit on behalf of others. I do not think it fair to read anything else into the rule which appears to me so clear.

I have seen the case of *Stephen Olang Misigah & Others vs Maxwell Ombogo* in HCCC No 187 of 1995 and the case of *Alice Wako & Others vs Eddy Wainaina & another*. This particular matter, namely the interpretation of order 1 rule 8 was not canvassed before these Courts although in the end they decided on it. I do agree that the Court cannot take cognizance of such a suit (representative suit) before the requirements of order 1 rule 8 are complied with. Here the plaintiffs had applied for and obtained an order to serve all the interested parties and this has been done. The defendants are trustees and are known so there is no complaint about suing them.

I do humbly find that order 1 rule 8 of our Civil Procedure Rules does not require the plaintiffs to have permission of the Court to file this suit. The sum total of the above is that I decline to sustain this preliminary objection. Let the application proceed to hearing. Costs of the preliminary objection to the plaintiffs.

Dated and delivered at Nairobi this 16<sup>th</sup> day of March, 2001

**J.W.O. OTIENO**

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**JUDGE**