



Tonkei & 2 others (Suing on their own behalf & on behalf of Inkoirero Self Help Group) v Kilusu & another (Environment & Land Case E032 of 2021) [2023] KEELC 15897 (KLR) (6 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E032 OF 2021
EM WASHE, J
MARCH 6, 2023
(FORMERLY NAROK ELC CASE 466 OF 2017)**

BETWEEN

**OLE UNUA TONKEI 1ST PLAINTIFF
SAMUEL LEKAKENY 2ND PLAINTIFF
MICHAEL LINKATOO OLOLABURA 3RD PLAINTIFF
SUING ON THEIR OWN BEHALF & ON BEHALF OF INKOIRERO SELF HELP GROUP**

AND

**DAVID LEOO KILUSU 1ST DEFENDANT
KILGORIS DISTRICT LAND REGISTRAR 2ND DEFENDANT**

RULING

1. The 1st Defendant (hereinafter referred to as “the Applicant”) filed a Notice of Preliminary Objection dated October 31, 2022 (hereinafter referred to as “the Preliminary Objection”) seeking for the suit filed on July 12, 2012 to be struck out for the following grounds; -
 - i. That the Plaintiffs are suing on behalf of Inkoirero Self Help Group which is not duly registered hence an unlawful entity.
 - ii. That Inkoirero Self Help Group is an unincorporated body without capacity to own land.
 - iii. That the Court lacks jurisdiction to hear and determine the claim by virtue of the express provisions of Section 18 and 19 of the [Land Registration Act](#) therefore the entire suit is ex-facie incompetent, frivolous, premature and an abuse of the Court process.



- iv. That the Plaintiffs cannot competently prosecute the suit as filed as they have failed to seek and issue the notice contemplated under Order 1 Rule 8(2) of the [Civil Procedure Rules, 2010](#) and that the Plaintiffs instituted this suit without the knowledge and consent of the other purported affected persons.
2. The Preliminary Objection was duly served on the 1st, 2nd and 3rd Plaintiffs who are principally the Respondents.
3. On the October 25, 2022, the Court directed that the Preliminary Objection be canvassed by way of written submissions.
4. The Applicant filed his submissions on the November 11, 2022 and the Respondents filed theirs on the 6th of December 2022.
5. The Court upon going through the Preliminary Objection as well as the submissions of the Applicant and the Respondents herein, the issues for determination can be summarised as follows; -
 1. Is Inkoirero self help group legally registered & capable to be sue and/or be sued?
 2. If the answer to the above is affirmative, does Inkoirero self help group have legal capacity to own the property known as LR No transmara/kimintet “d”/480?
 3. Is the cause of action in this suit subject to the provisions of section 18 & 19 of the [Land Registration Act](#), No 12 of 2012?
 4. What are the legal effects of order 1 rule 8 (2) of the [Civil Procedure Rules, 2010](#) on the present suit?
6. Before the Court can embark on the determination of the above issues, it is important to remind itself the perimeters within which an issue of preliminary objection should be canvassed.
7. In the leading case of [Mukhisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd](#) (1969) EA 696

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

“It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
8. Having a clear mind as to the perimeters within which issues of preliminary objections should be canvassed, the Court will now proceed to determine the issues outlined hereinabove.

Is Inkoirero self help group legally registered & capable to be sue and/or be sued?

9. The Applicant’s submission is that Plaintiffs in this suit who are the Respondents in the present Preliminary Objection instituted this suit as officials of Inkoirero Self Help Group.
10. The Applicant’s position in their submissions is that although Inkoirero Self Help Group does not have legal status to institute legal proceedings and/or defend the same, its representatives can take out



such proceedings only if the said group has been duly registered by the Ministry of Labour and Social Protection.

11. Unfortunately, in this case Inkoirero Self Help Group has never been registered as Self-Help Group and therefore in non-existent hence the Respondents in this preliminary objection do not have any locus standi to institute and/or defend this suit as representatives of Inkoirero Self Help Group.
12. The Applicant has further submitted that Section 4 of the Societies Act deems any society not duly registered under this section as an illegal and unlawful society.
13. The Applicant relied on the case of Daniel K.Yego & 3 others v Paulina Nekesa Kode (2016) eKLR.
14. The Respondents on the other hand submitted that Inkoirero Self Help Group is a duly registered Group Ranch with a valid Certificate of Registration as a Self-Help Group/ Project issued on the 06.08/2020.
15. According to the Replying Affidavit filed on the 6th of December 2022, Inkoirero Self Help Group was registered on the 31/03/2004.
16. The Respondents further submitted that based on the fact that INkoirero Self Help Group is duly registered, then the officials and/or representatives can institute legal proceedings and/or defend on behalf of the general membership as has done in this suit.
17. The Respondents placed reliance of the authority of Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgan Community-wadhari Clan) v Victory Constructions Co. Ltd & 2 others (2015) eKLR where the Court held as follows; -

“Under Article 260 of the Constitution a “person” includes a company, association or other body of persons whether incorporated or not. Of Course, bodies have capacity to sue or be sued as the law vests them with legal capacity. What the Constitution addresses here are the unincorporated bodies or a class of persons such as self-help groups. The Law does not bestow them the legal capacity per se but the Constitution provides for an avenue through which they can competently appear in court and this is through person(s) vested with legal capacity.”

18. Referring to the Replying Affidavit filed on the 6th of December 2022 albert without leave, the Respondents have placed before the Court a Certificate of Registration of the Self-Help Group known as Inkoirero Self Help Group dated August 6, 2020.
19. According to this Certificate of Registration, Inkoirero Self Help Group Is a Self Help Group registered on the March 31, 2004.
20. This in the mind of the Court clears the contention of whether or not Inkoirero Self Help Group is a legal entity or not.
21. The evidence placed before Court by the Respondents confirms that Inkoirero Self Help Group is a duly registered Self-Help Group under the Ministry of Labour and Social Protection.
22. Be as it may, despite the fact that Inkoirero Self Help Group is duly registered, it is settled law that it does not have capacity to sue or to be sued.



23. In the case cited by the Respondents which is *Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgan Community-wadhari Clan) v Victory Constructions Co. Ltd & 2 others* (2015) eKLR, the Court further observed as follows; -

“Self Help group, or community-based organisations were created by the government to address poverty eradication and other noble causes, but were not clothed with the capacity to sue but can do so through its elected officials whose description should be given to show who they are and who they represent.”

24. Paragraph 5 of the Amended Amended Complaint dated 24th of May 2017, the Respondents describe themselves as follows;

“the registered proprietors of the parcel of land known as LR No Transmara/Kimintet “D”/480 measuring approximately 136.52 Hectares which property was registered in the Plaintiff’s name on the 19th of May 2011 on their own behalf of Inkoirero Self Help Group”

25. Referring to the Title Deed of the property known as Transmara/Kimintet “D”/480 issued on the 31st of March 2004, the Court notes that the same reads the name Inkoirero Self Help Group.

26. However, the Green Card of the property known as LR No Transmara/Kimintet “D”/480 bears the names of the Respondents as representatives of Inkoirero Self Help Group.

27. In the case of *Kipsiwo Community Self Help Group v The Attorney General & 6 others* (2013) eKLR, the Court observed as follows; -

“the person bring action has to demonstrate that he has permission to bring the action on behalf of the members of the group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognise the persons who seek redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the Court does not know who the litigants are, then it becomes impossible for the Court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had the obligation to obey or enforce such orders.”

28. In the earlier cited case of *Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgan Community-wadhari Clan) v Victory Constructions Co. Ltd & 2 others* (2015) eKLR, the Court observed as follows; -

“They state clearly that they have brought this “suit on a representative capacity”. However, they have not disclosed whether they hold any elected offices with the named community/ clan. They have not given the names of the members of the named community/clan and the Court is unable to establish whether or not they have obtained the authority or mandate of the members of the named community/clan to file this suit.”

The issue of capacity to sue cannot be a matter of procedure as Counsel for the Plaintiffs submitted to be cured through Article 159 of the *Constitution* by the consideration of substantive justice.

The lack of capacity cannot be cured by Article 159 of the *Constitution* that emphasizes on substantive justice or by application of the oxygen principle.....”



29. According to the Respondents bundle of Documents filed on the 26th of April 2022, which they seek to rely upon at the hearing of this case, it is clear that the Respondents who are the Plaintiffs in this suit have not attached the list of the members belonging to Inkoirero Self Help Group, any minutes by the members resolving to institute this suit and/or any authority by members to institute this suit.
30. The Court's considered view is that the Plaintiffs in this suit who are also the Respondents in this Preliminary Objection have no capacity to file any suit on behalf of Inkoirero Self Help Group as alleged in the Amended Amended Plaint dated 24th May 2017.
31. On the other issues namely Issue No 2,3 & 4, the same were to be considered based on the success of the Issue No1.
32. Consequently therefore, this Court having made a finding that the Plaintiffs herein did not have capacity to institute this suit in the first place, it would be an academic exercise to determine those other issues as there would be no suit for parties to enforce any determinations thereof.
33. In conclusion therefore, the Court hereby makes the following Orders as appertains the Preliminary Objection dated October 31, 2022; -
 - A. The preliminary objection dated October 31, 2022 is merited.
 - B. The amended amended plaint dated May 24, 2017 be and is hereby struck out forthwith.
 - C. The plaintiffs shall bear the costs of the suit as well as this preliminary objection.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 6TH OF MARCH 2023.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: NGENO

ADVOCATES FOR THE APPLICANTS: MOMANYI

(NO APPEARANCE)

ADVOCATES FOR THE RESPONDENTS: DR. NYAUNDI

