



**Adero & 3 others v Odalo & 3 others (Environment & Land Case
366 of 2011) [2023] KEELC 21351 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 366 OF 2011
LC KOMINGOI, J
NOVEMBER 9, 2023**

BETWEEN

**THOMAS NDINYA ADERO 1ST PLAINTIFF
TOBBY AUMA ONGANY 2ND PLAINTIFF
JACK JAMES ONONGNO 3RD PLAINTIFF
WILLIAM OCHIENG NYAWIR 4TH PLAINTIFF**

AND

**WILFRED OLUOCH ODALO 1ST DEFENDANT
DOUGLAS ODHIAMBO OMINDHE 2ND DEFENDANT
ANDREW ODINYA OOKO 3RD DEFENDANT
DAVID KOLA AWITI 4TH DEFENDANT**

JUDGMENT

1. By a plaint dated 21st July 2011 and amended on 21st November 2013, the Plaintiffs prays for judgment against the Defendants for;
 - a. A permanent order of injunction barring the Defendants from calling for an AGM or any meeting to discuss plot allocation and /or altering plot allocation done in year 2000 or interfering with the ballot and allotment done in the same year 2000 and to maintain the register (plot list) compiled by the surveyor and secretary after the 2000 ballot.
 - b. Production of all records and documents relating to plot allocation ownership from the first ballot to the present ownership status.



- c. An order of permanent injunction barring the Defendants from selling, subdividing, allocating, issuing allotment letters, wasting, or dealing in any way whatsoever with any plot within blocks LR No.18271,18272,18276 and 18277.
 - d. Compensation to those members whose plots have been sold without their consent at the current market value where the land has been developed.
 - e. Convention of AGM for purposes of conduction of an election of new office bearers in accordance with the original constitution ratified in the year 2000.
 - f. Costs of the suit.
2. The Plaintiffs contend that they bring this suit on behalf of Dandora off Kangundo Road Self Help group project (herein referred to as Dandora group) that came into existence on 30th May 2000 upon formal registration. They aver that the groups' main objective was to help members improve themselves economically and in line with its objectives and with the help of the then Kasarani Member of Parliament Hon. William Omondi, they identified 4 blocks of land being Blocks 18271, 18272, 18276 and 18277 and set them aside for allocation to members. The 1st office bearers of Dandora group identified 800 members and balloted plots for allocation in accordance with the ballot and the survey map that had been approved by relevant authorities including City Council of Nairobi.
 3. The Plaintiff also states that before the year 2004, all the plots had been allotted and members had taken possession. In 2004, the patron of the group, Hon. William Omondi requisitioned an AGM in which new officials comprising of the Defendants were elected to office.
 4. It is the Plaintiff's case that the new officials without the Knowledge and support of the project surveyor William Omondi conducted a 2nd allotment which was a ploy to illegally change the original allotments of upto 500 persons and sell them to their friends, members of the administration and officials from the Ministry of Gender and sports without consulting the owners. The Plaintiff's also accuse the Defendants of maliciously planning to have Dandora group deregistered.

The Defendants' case.

5. The Defendants filed a joint statement of defence dated 11th December, 2013.They denied the Plaintiff's claim and sought that the Plaintiffs suit be dismissed with costs.

Evidence of the Plaintiffs.

6. The Plaintiff called three witnesses. PW1 was Hon William Omondi, a former Member of Parliament for Kasarani Constituency.He told the court that in 2000, he was the coordinator of National Development Party (NDP) and since he understood the plight of the Party's followers, he decided to mobilize them to form a self-help group to improve their welfare.
7. They were to get land from the Ministry or the provincial administration so he approached Provincial Commissioner-Nairobi Cyrus Maina who referred him to the District Officer -Embakasi .He took him to the site of the suit land and showed him the area and advised him to go to Nairobi City Council and get a confirmation of the availability of the plots. He subsequently got confirmation from City council that the plots were vacant.
8. They then organized themselves and formed an internal body comprising of 29 members and registered it. The produced a certificate of registration of Dandora off Kangundo Road Self Help Group as P.Exhibit 1 and its constitution as P.Exhibit 2.After that ,with a team of surveyors, they did a subdivision of the area and Nairobi city council also sent a representative during the exercise which



- produced 800 plots which were subdivided from LR No's 18271,18272,18277 and 18276 but they were later grabbed by officials.
9. He testified that they invited members of the Dandora Self Help Group to own the plots that had been subdivided .They were to pay a membership fee of kshs.500/=He produced the list of members at page 2-32 of the Plaintiff's bundle and stated that it was made by the interim officials and he was also involved as being a surveyor, he headed the survey team.
 10. He testified that he was the Patron while the 3rd Defendant was the chairman, the 2nd Defendant was the Secretary and the 4th Defendant was the treasurer .He stated that there was an attempt to dissolve Dandora Self Help Group and a claim that the officials had removed him as a patron and he was notified of the intention. He stated that in the meeting of 26th July 2009, he was not removed. However, his name was removed as a signatory to Dandora Group bank accounts.
 11. He told the Court that his prayer is that Dandora Group's constitution be reinstated and that the original allottees be retained. He pointed out that About 700 plots were altered and lost and members who lost their plots and who registered complains with him include Richard Odando,Patrick Njuguna, David A kola among others.
 12. He also testified that in the initial Constitution they formulated for Dandora Self Help Group, any Kenyan and resident of Nairobi would be admitted as a member of Dandora group. He testified that as a patron, he was not aware of the Annual General meeting called to change *the constitution*. Referring to the amended Constitution at page 31 of the Defendant's supplementary list of documents, he stated that the initial constitution did not contemplate membership to the group to be limited to only those owning a plot. He further stated that the 2nd Defendant has 13 plots ,the 1st Defendant who had only 1 plot initially now has 14 plots while the 3rd Defendant has 70.
 13. He testified that when they registered the self-help group, they had officials, committee members and 800 members. He told the court that between 2000-2001, they did a ballot supervised by a social development officer and prepared the allocation list at page 2-32 of the Plaintiff's bundle exhibit produced as P.exhibit 3 . It lists the members that were balloted and issued plots and 1st column shows the plot numbers followed by membership number, then ownership certificate number then transferee in case allottee transferred, then the payment. He added that they were paying Ksh 500/= for membership and security.
 14. He stated that the people whose names are handwritten are the ones who lost their plots. He also stated that after the balloting, there were letters of allotment from City council of Nairobi formalizing the project but the council denied issue sing them.
 15. When cross-examined, he stated that the Defendants joined Dandora Self Help Group after the group was registered. They were not founder members. Only the 3rd Defendant was a founder member. He added that and the chairman was instrumental in drafting the original constitution and interim members were chosen amongst the initial members themselves in 2000. The 3rd Defendant was elected chairman, and the 4th Defendant Secretary.
 16. He further stated that they were in office in 2000-2004 when members held an annual general meeting. Referred to the AGM of 26th July 2009, he stated that though his name appears in the minutes, he did not take part in that meeting. He added that so far, 500 members have had their plots swapped /taken without consent and that they are part of this case. He stated that there are some developments in some plots and the people who bought the plots and have constructed are not parties to this suit.



17. He also stated that there are other pending cases between the parties but issues are not the same. He pointed out HCCC 467 OF 2005 and HCCC 844 of 2006 and stated that parties are the same as this suit and that there have been wrangles over the management of the self-help group.
18. He stated that the initial objective of the group was to put people together and promote them economically. They needed land for the said activities. Initially, the plots were 875 and after subdivision, 75 plots were knocked out. He stated that during the subdivision exercise, they consulted Nairobi city Council as it has to approve plans before issuing allotment letters but it did not participate in the process.
19. Referred to the allotment letters at page 39 and 40 of the Defendant's supplementary bundle, which are allotment letters for plot 006 and 222 Dandora Off Kangundo Road Self Help Group, he stated that he was not aware that allotment letters were issued members.
20. PW1 also stated that balloting was done in the year 2000 and once a ballot is picked, it goes to the surveyor who shows the members the plots. Since the self help group had over 1000 members, those who did not get plots were asked to remain patient as they looked for more land. He added that each member was to get a plot but some officials were entitled to 5 plots each and the chairman got 115 plots.
21. When referred to *the constitution* of the group at page 218-223 of the Plaintiff's bundle, he stated that it does not mention how the plots were to be distributed to members. Even those who got 15,30 or 5 plots balloted for the plots .He further stated that he got 100 plots out of the 800 plots sold 10 and currently holds none. He stated that the Retired Honourable Prime Minister got 30 plots while former Nairobi Provincial Commissioner Cyrus Maina got 60 plots. He added that the plots were not allocated that way because of corruption.
22. When referred to Article 3 (c) of the group's Constitution at page 9 of the Defendant's bundle, he stated that it states that membership depends on owning a plot and according to the provision, he is not a member of Dandora Off Kangundo Road Self Help Group. .He added that the letter dated 4.11.2010 from the Ministry of Gender, Children & Social Development confirms that that an amended constitution was filed on 22.1.2006.He contends that that there was no AGM to ratify the said constitutional amendment.
23. He stated that the Plaintiffs have plots in the scheme but he does not know their plot numbers. Referred to the list at page 2-31 of the Plaintiff's bundle, he stated that it is the genuine list of the members of Dandora Knagundo Squatters resettlement project which is a subsidiary of the Self Help Group but he has no resolution or minutes for its creation.
24. He also stated that he cannot tell the number of members who are in their plots at the moment but over 700 people in the land are not members of Dandora Self Help Group. The genuine members lost their plots between 2000-2011.
25. He stated that he was removed from being a signatory to Dandora self-help group's bank accounts by a resolution. He added that any 3 signatories and the can sign for funds, as *the constitution* does not say that the patron must sign. He further stated that money was stolen from the self-help group's bank account but he cannot state how much and that he reported the loss to banking fraud and the police but the Defendants have not been arrested or charged.
26. When re-examined, he stated that he is the one who initiated the project and that he discussed with Nairobi Provincial Commissioner and with Hon Raila who was the then patron of NDP. He was given 4 plots. Together with the District Officer; Embakasi, they agreed to take 60 plots to the Provincial Commissioner; Nairobi and 30 plots to Hon. Raila. He was then given 100 plots to give to people who



- had qualified for allocation. These were people who were landless and the ones he needed to assist in his vision.
27. He also stated that his interest is that people he had set out to assist were denied the plots. He adds that he has the documents showing allocation of plots to the initial members but numbers were changed to confuse the Plaintiffs. He further stated that any plot allocated after the year 2004 must have been allocated fraudulently as all the plots had been allocated by that year.
 28. PW2 Thomas Ndinya Adero was the 1st Plaintiff. He told the court that he is a member of the Dandora group and the founder and that they formed the group with the objective to assist each other economically, socially and politically by giving them land. He stated that they requested the patron PW1, to look for land for the members. That the initial office bearers were the 3rd Defendant- chairman, Peter Ochieng-secretary while he was the treasurer. There were about 800 plots in the said project. He left the office in the year 2004 after elections were held and new officials were elected. He stated that before 2004, all plots had already been allocated thus the original list of members is the one at page 2-32 of the Plaintiff's bundle.
 29. He told the court that from the list it is easy to tell who owned which plot thus another allotment could not have been done. Referred to the list of allottees at page 33-58 of the Plaintiff's bundle, he stated that it is not the original list but a disruption of what had been done before. He stated that the plots have been developed by people who the original owners do not know.
 30. He stated that the new office bearers changed the plot numbers, plans, and members list thus original members have been denied plots. He further stated that the plots were not approved by the Nairobi County Council.
 31. He stated that the initial office bearers whom he is part of handed over *the constitution*, members list, records, surveyors plans, plot cards, which were signed by 4 officials .He testified that they now say he is not a member since they sold his plot No. 777 to one Amos. He added that membership is not tied to plot ownership .
 32. When cross-examined, he stated that being a member of the self-help group was not tied to owning a plot as long one participates in the activities of the group and payed the annual fee. Referred to Article 3 (c) of the amended Dandora off Knag undo Road Self Help Group Constitution, he stated that it states that a member is one who owns a plot but that is not correct as owning a plot was just an objective of the self- help group.
 33. He stated that he had plot 680 and 777 which he balloted for and got as a member of the self-help group and that his plot was sold to Amos. When referred to the member's list at page 2-32 of the Plaintiff's bundle, he stated that the initial name of the self Help Group was Dandora Off Kagundo Road Self Help Group and the certificate of registration was issued in 2000. Referred to Dandora off Kangundo Road squatters resettlement project (DARKS) he stated that they do not have a certificate of registration for the group and that his name appears in both lists.
 34. When referred to the list on page 34-57 of the Defendants' bundle, he stated that it is not the original list. Referred to page 53 of the Plaintiff's bundle, which indicates that plot 680 belongs to Eveline Millicent Adhiambo and page 55- which indicates that plot 777 belongs to Fredrick Nyakwaka Arwayo,he stated that he had constructed on one of his plots but he sold the house to Mrs.Mboya as the ground was hostile.
 35. When probed further, he stated that he did not sell any plots and has sued the Defendants as officials of the self-help group on behalf of other members and have authority to sue on their behalf but they did not sign any authority.



36. When referred to page 39 of the Defendant's bundle Dated 21st May 2014, which shows HCCC 467/2005, he stated that he was sued as a Defendant in that suit. Referred to the prayers in the amended suit herein, he stated that the Plaintiffs pray that this case be dealt with in propriety of other cases. Referred to HCCC844/2006, he stated that the 2nd Plaintiff is a witness in the said case while in CMCC 10688/2006, the Plaintiffs herein are the Plaintiffs in that case and that the 2 suits are pending but HCC467/05 was in their favour.
37. He stated that after 2004, there were no plots to be allocated as the officials had no more plots to give but many members' plots were taken away, about 40 members lost their plots as the officials sold them to 3rd parties or gave them to their relatives. He further stated that he is not aware the city council of Nairobi gave allotment letters and he is not aware of the AGM meeting of 18th April 2010 which was organized by the Defendants. He added that the original list of members at page 2-32 is genuine and the 2nd list does not state how the allottees acquired the plots.
38. PW3 was Patrick Njuguna, who told the court that he lost plots 414 and 417. He testified that he was not a member of the group but he bought from the chairman, paid the purchase price and was issued with receipts. He was then given a beacon certificate and a membership card. He applied to be supplied with electricity to the plots. He later developed them and had built g halfway when official s of the self help group one Douglas and Kola stopped him from developing plot 417 and told him to be grateful his remaining plot was not taken away. They told him to pay ksh.35,000/= for security but since he never completed making the payments, he was evicted from the plot. He reported the matter to the District commissioner.
39. When cross- examined, PW3 stated that he bought plots 414 and 417 from the 3rd Defendant(now deceased) but plot 414 is not in issue. He further stated that he blames officials of the self-help group for his predicament. He added that that Fredrick Ongunyo is now on his plot and he does not know how he acquired it and he reported the matter to the police but Ongunyo has not been arrested thus he is here to seek justice. He also stated that he was issued a membership card for Dandora off Kangundo Road Squatters Resettlement Project. Referred to the list of owners of plots in the Defendant's bundle he stated that its shows David Kola owns plot 417.

Evidence of the Defendants.

40. The Defendants called one witness.DW1 Daniel Odhiambo Omudhe, was the 2nd Defendant. He told the court that he is the Secretary General of Dandora Off Kangundo Road Self Help Group. His witness statement dated 22nd May and 30th May were adopted as part of his evidence in this case. The Defendant's bundle of documents dated 21st May 2014 and 30th May 2014 were produced as D.Exhibit 1 and 2 respectively.
41. He told the Court the objective of the Group was to provide parcels of land so that members could invest in homes. He testified that they identified four (4) parcels of land LR No.s 18271,18272, 18276 and 18277 and engaged a surveyor to do the survey so that members could have their portions. He further testified that there were 875 plots while members were 524.It was his testimony that they allocated the plots and some members developed theirs and are residing at Obama Estate while others did not as the area is 2/4 developed.
42. It was his testimony that contrary to what the Plaintiffs told the Court, they did not interfere with any plots and have not taken plots for about 500 members and sold them as alleged. He testified that PW1 was the group patron and surveyor. He further testified that after the survey, the patron got his plots which he sold to other members and some he gave out as he was a Member of Parliament. He



- added that since PW1 sold all his plots, he is no longer a member of the self-help group while those who bought plots are now members as per the group's constitution.
43. He told the Court that the 1st Defendant was once a member and Treasurer of the group but once he sold his plots, he ceased to be a member. The 2nd Plaintiff also ceased being a member by virtue of selling his plots. He stated that he does not know the 3rd Defendant and 4th Plaintiff as they have never been members of the Self Help Group. It was his testimony that the Plaintiffs cannot seek any prayers from the court on behalf of the group and that about 642 members reside and have developed their plots while none of the Plaintiffs reside there. He stated that the prayer for allotment nullification will affect their members as they are paying rates.
 44. It was also his testimony that they have appeared before different courts in cases filed by PW1 over the same issues. He pointed out HCCC 467 of 2005 Andrew Odeya Ouko, Donald Odhiambo omwodhe, David Awiti Kola suing on behalf of the self-help group where the Defendants No.46 are the Plaintiffs in this case and the prayers sought were a permanent injunction in respect of the suit plots. He also pointed out HCC 984 of 2006 where the Plaintiffs in this case have been sued as Defendants. The prayers sought in the said matter are the same prayers sought herein, including a permanent injunction. He added that in CMCC No.10668 of 2006, the 1st and 2nd Plaintiffs herein are the Plaintiffs in that case, the Defendants herein are sued as Defendant and prayers sought include a permanent injunction.
 45. He testified that they were holding and AGM on 18th April 2010 before they were stopped by the court. PW1 was present in the AGM and no member raised any claim. He prayed that the suit be dismissed and that they be allowed to serve their members and that the Plaintiffs be restrained from interfering with the affairs of the self-help group.
 46. When cross-examined, he stated that before the year 2000, he was a member of Dandora off Kangundo Road Self Help Group and that members of NDP came up with the idea. He further stated that he was elected on 2nd January 2006 as a secretary and the chairman was the 4th Defendant. The secretary was Peter Ochieng Ouma and the treasurer was the 1st Plaintiff and they were all in office before him and that he did not attend meetings before 2006.
 47. He also stated that the Chairman and Treasurer recorded witness statements and that *the constitution* of the group which was amended before the election in 2006 gives him authority to represent the group. Referred to *the Constitution* of the group, he stated that officials forwarded *the Constitution* to the office of the Registrar of societies then it was stamped on 4th November 2010 by the Ministry of Gender social services and he was in the office then. He also stated that they looked at *the constitution* before amending it and that they wanted to make it clear that if you sell your plot you cease to be a member.
 48. When referred to Article 3 paragraph 3 of the group's constitution, he stated that the Plaintiffs ceased to be members of the group when they sold their plots. Tasked on why Articles 12-14 of *the Constitution* were missing he stated that he did not know and that Article 14 provides that an amendment is to be done by 2/3 of the members and that at page 17, there is a list of members who attended the AGM of 18th October 2010.
 49. He stated that the 1st balloting of plots was done in 2000 whereby the surveyor brought a map which showed the plots. He stated that he had 6 plots while the group had 875 plots which were all taken up after balloting. He further stated that he has not sold any plot which is not his.
 50. When referred to the meeting of 27th July 2009 which he, he stated that there is a resolution that buyers become members upon having a plot. He pointed out that PW1 was present but he did not have a plot. He also stated that members were notified about the agenda of that meeting which was "plot ownership."



51. When referred to HCCC 46 OF 2005, he stated that PW1 does not appear as a party in the case and that has not sued him. He also stated that the Plaintiffs have filed suits against him and he has equally filed suits against them. Referred to page 35 of the Plaintiff's bundle, he stated that he has signed the list as the secretary and that balloting was done before he came into office and he only received the list from various officials which they reconciled and submitted to the council for allotment of plots on 2nd July 2019.
52. On re-examination, he stated that he has been a member of the self-help group from inception as it was formed on 21st May 2000. Referred to the plaint, he stated that the Defendants are sued as 4 individuals and not as officials of the group. He also stated that there was an AGM held on 26th January 2006 authorizing the amendment of *the constitution*.
53. When referred to the Annual General Meeting of 26th July 2009, he stated the agenda was amendment of *the Constitution*, it was an agenda of the officials and they did not as officials pass a resolution that *the Constitution* be amended.
54. He also stated that PW1 was a party in one case he instituted and that he has taken the Defendants to several offices with the same grievances. He further stated that the list submitted to the Town Clerk on 27th July 2009 has the same number of plots that were allocated and there was no alteration. He added that they did not take any member's plot and the members have not complained that they sold their plots.
55. At the close of oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions.

56. They are dated 16th May 2022. They address the following issues;
 - a. Whether the plot numbers were changed after 2000 ballot.
 - b. Whether there was a constitutional change in 2006 or which the applicable Constitution is.
 - c. Who are bonafide members of DORKS.
 - d. Whether any credible election has ever been conducted after year 2004.
 - e. Whether the court should reinstate the plot back to the owners as per ballot of 2000 in accordance with P.Exhibit 2 the map in correspondence with list of plots, document on page 2 - 32 of the Plaintiffs documents.
 - f. Are orders prayed for grantable?
57. It is the Plaintiffs' submission that the plot numbers were changed. They point out that when PW1 was called to testify, he disowned the plot list authored by the Defendants. They argue that the list at page 2 - 32 of the Plaintiff's bundle dated 10th April 2014 is the correct list and it bears the plot number on the first column, name of the allottee on the 2nd column, membership number on the third column, transfers and payment.
58. The Plaintiffs point out the inconsistencies in the 2 lists herein. They point to the sale agreement dated 17th January 2005 where the Defendants purported to sell to one Enock Chanai Mogaka plot number 6. In the original ballot list, the plot belongs to John N. Dundy. In the Defendants list dated 26/07/2010 the plot belongs to Risper Adhiambo Ochieng who is posted to plot No. 67. They submit that from page 118 of the Plaintiffs' bundle to the end are complaints by people who lost their plots in the scam orchestrated by the Defendants.



59. They urge the Court to conclude that the Defendants jungled up the plot numbers, repossessed plots from members sold some to unsuspecting members of the public, acquired others themselves thereby throwing the whole scheme into shambles and turmoil.
60. On the issue of the applicable constitution, they submit that there is an amended Constitution annexed to the Defendant's supplementary list of documents. They argue that the 1st Constitution promulgated in 2000 provided for means through which the same Constitution could be amended; by at least 2/3 of members present and voting at Annual General Meeting yet there was no general meeting held in 2006. They urge the Court to hold that the amendment is null.
61. They submit that the members of DORKS who are the complainants herein had acquired interest in the property when the first ballot was concluded and list of members and their respective plots published. Each member took possession of his or her plot but they were grabbed contrary to Article 40 of *the constitution*.
62. It is their submission that the court ought to give due regards to larger public interest to be served by the suit properly over the narrow selfish interest of a few individuals. They urge the Court to find that though none of the opposing parties have title deeds, their interest in the property had crystallized when ballot was conducted and members took possession of their respective portions of land within L.R 18272, 18276 and 18277

The Defendants' submissions.

63. They are dated 29th June 2022. They address issues;
 - a. Whether the suit is Res Subjudice, Res judicata and an abuse of the Court process.
 - b. Whether the suit as instituted by the Plaintiffs as against the Defendants is competent and properly before the Court.
 - c. Risk of Third parties being adversely affected without being heard.
 - d. Whether the Plaintiffs Suit has any merits.
 - e. Whether the Orders sought can be granted.
64. It is the Defendants' submission that it is apparent that there has been and there still exists numerous cases between the Plaintiff and the Defendant over the ownership and control of the suit property and the leadership of Dandora off Kangundo Road Self Help Group. They point out that the cases are; Nairobi HCCC No.467 of 2005, Milimani CMCC No.10688 of 2006 and Milimani CMCC No.1497 of 2010 thus the suit is subjudice. They rely on the case of Catherine Nyaboke Nyangau v Evangeline Njoka & 3 others 2021 eKLR. They also argue that the suit is an abuse of the court process since the Plaintiffs have filed multiple suits on the same issues.
65. The Defendants cite the case of Jack Mukhongo Munialo v Naoia Sugar Co.Ltd another [2017] eKLR, Kahindi Katana Mwago & another v Cannon Assurance (K) Ltd [2013] eKLR as well as the case of James Yulu v Samson Nzuki & 2 others [2020] eKLR to submit that the suit offends provisions of Order 1 Rule 8 of the Civil Procedure Rules for lack of public advertisement of the suit and in the alternative lack of written and filed authority by the persons on whose behalf the suit herein has been filed.
66. They also argue that the complaints herein are against the Defendants in their capacities as officials of Dandora off Kangundo Road Self Help Group and the remedies sought against them are in such capacities and for alleged commissions and omissions done in their official capacities yet they have been



- sued in their personal capacities thus the plaint offends Order 4 rule 4 of the Civil Procedure Rules. The rely on the case of Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] eKLR and the case of Kituo Cha Sheria v John Ndirangu Kariuki & another [2013] eKLR .
67. The Defendants also argue that if the Plaint is allowed, 3rd parties risk being affected. They point out that over 500 members who were allotted the plots have lived there for over 22 years and have acquired personal proprietary rights vested unto themselves by the allotment letters. They also argue others have sold their plots to 3rd parties.
68. They submit that the plots whose allotment requires nullification have not been identified .The Plaintiff wants all plots allocated after 2004 nullified without indicating which plots and without any establishment whether they were validly allocated. The owners of such plots will not have a chance to be heard. They add that other persons named in the suit including provincial administrators like the District officer a, Provincial Commissioner and Honourable Raila Odinga have not been enjoined and they risk being condemned unheard.
69. They submit that the Plaintiff's case has no merit and that the Plaintiff failed to discharge the burden of proof. They rely on the case of Alexander Mwendwa Mwova & others v Attorney General [2021] eKLR and the case of Kenya Women Finance Trust v Isca Adhiambo Okayo [2014] eKLR. They point out that at page 2-32 of the Plaintiff's bundle of documents dated 10.4.2014, the list of alleged persons who were balloted plots belongs to an entity known as Dandora Off Kangundo Squatters resettlement Project which has no affiliation with Dandora off Kangundo Road Self Help Group. They add that the alleged constitution at page 218-213 of the Plaintiff's bundle of documents is undated not signed, not registered by the Ministry of Sports and social Services thus its origin is questionable and it is unauthentic while the genuine Constitution at page 8-16 of the Defendants' bundle is a genuine constitution and has never been challenged. They cite the case of JMK v MWM & Another (2015) eKLR as well as the case of Francis Mbobobia v Invesco Insurance Company Limited: Mwirigi Muguna Nkori (Intended Interested Party/ Applicant)[2021] eKLR.
70. In rejoinder, the Plaintiffs filed written submissions dated 8.8.2022. On the issue of res-judicata, they submit that the plea is not based on any evidence as all the suits cited abated and were dismissed for want of prosecution.
71. They also submit that the suit is a proper representative suit. They argue that that one of the objectives for Dandora off Kangundo road Self Help group was settlement of its members hence the name Dandora off Kangundo Road squatters' resettlement is not a strange entity as claimed.
72. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited the issues for determination are;
- a. Whether the suit is a representative suit.
 - b. Whether the suit is sub judice.
 - c. Were the initial plots balloted within blocks LR No.18271, 18272, 18276 and 18277 changed?
 - d. Was the original list of allottees of Dandora Off Kangundo road self Help group amended with a view to disposes the original allottees?
 - e. Who should bear costs of this suit?
73. The plaintiffs contend that they bring this suit on behalf of Dandora Off Kangundo Road Self Help Group Project. The defendants on the other hand stated that this suit does not qualify as a



representative suit pursuant to Order 1 Rule 8 of the Civil Procedure Rule. Order 1 Rule 8 of the Civil Procedure Rule provides that;

1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or 21 CAP. 21 Civil Procedure [Subsidiary] against any one or more of them as representing all or as representing all except one or more of them.
- (2) The parties shall in such case give notice 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. 9.

Rule 13 of the Civil Procedure Rules provides that;

- (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

74. I have gone through the plaint herein in paragraph 3, it is stated that the plaintiffs bring this suit on their behalf and on behalf of the rest of the members of Dandora Off Kangundo Self help group.

I agree with the Defendants' submissions that a proper authority ought to have been signed by each member and duly filed in the suit. I find that failure to comply with the mandatory requirements of order 1 rule 13 of the Civil Procedure Code is fatal to the plaintiff's suit.

In the case of Kahindi Katana Mwango & Another Vs. Cannon Assurance (K) Ltd (2023)eKLR the court stated as follows:

“Indeed, Order 4 rule 4 of the Civil Procedure Rule requires that where the plaintiff sues in a representative capacity, the plaint shall state the capacity in which he sues. The plaintiff's originating summons does not state whether the Jeuri Community Based Organization, through the two plaintiffs suing on behalf of 41 others is a representative suit or not. That in my view renders the suit inevitably defective. As at the time of filing the suit the plaintiffs were under no obligation to show the written authority entitling them to sue on behalf “JEURI COMMUNITY BASED ORGANISATION” or on behalf of 41 others in accordance with the provisions of Order 1 rule 8 of the Civil Procedure Rule 2010. The applicant cannot just annex a list of inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein.”

The same position was taken by the court on the case of Abdulla Abshir & 35 Others Vs. Yasmin Farah Mohammed (2015) eKLR.

75. The plaintiffs on the other hand urge this court not to look at the form but the substance of the authority as Article 159 of *the constitution* implores upon the court to administer justice without undue regard to technicalities. I disagree it has been stated time and again that where there are express provisions, the same must be complied with strictly. No justifiable case has been given as to why there was no compliance with order 1 rule 8, 13 of the Civil Procedure Rule, 2010.



76. There was also allegation that this suit is subjudice other suits filed by the parties herein being Nairobi HCCC No.467 of 2005, Milimani CMCC No.10688 of 2006 and Milimani CMCC No.1497 of 2010.
77. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others* (2002) e KLR, the Supreme Court of Kenya held; “The purpose of sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.
78. I have perused the evidence presented on this issue by the Defendants who seek to invoke the doctrine of res-subjudice. The evidence is not enough for this court to adopt the rule. A part form the pleadings being annexed, no evidence was placed before the court to show that the suits are pending in light of the Defendants’ submission that they all abated.
79. The Plaintiffs asks this court to adopt the names and plot numbers as per the list in their bundle of documents contained at page 2-23 of the bundle dated 10.4.2014 as the legitimate allottees of plots hived from blocks LR No.18271,18272,18276 and 18277 by Dandora Off Kangundo Road Self Help Group Project. Their case is that the names appearing in the said list are the original allottees of the suit plots which were balloted prior to 2004.
80. They argue that in 2004, new office bearers of the Dandora group who comprise the Defendants changed plot numbers and amended the original members’ list prepared by the initial office bearers and thereby disposed about 500 members of the Dandora group of their plots.
81. None of the persons who are said to have been disposed of their land testified. The Plaintiffs have also accused the Defendants of conspiring to change *the Constitution* of the group. The Defendant tabled evidence that the changes were effected by a resolution of members in a meeting thus due process was followed. Further, none of the members of the group was called to confirm that the changes were without their consent.
82. I note that the list at page 2-32 of the Plaintiffs’ bundle is for ‘Dandora Kangundo Road Squatters Resettlement Project and not the entity known as Dandora Off Kangundo road Self- Help Group. No nexus was established between the two groups. Further, there is no evidence that the initial allottees of Kangundo Road Self Help Group were displaced and in their place new members allocated their plots.
83. PW3 who claimed to have lost a plot was not an initial Allottee. He told the Court that he had purchased his plot. 417 from the 3rd Defendant.PW1 and PW3 confirmed to the court that they no longer hold plots in the suit property. PW3 stated that one Fredrick Ongunyo is in his plot 417 which was sold to him by the 3rd Defendant. There is no evidence that the alleged sale by the 3rd Defendant was in his capacity as chairman of Dandora group. Be that as it may, PW3 would have pursued him and the Said Fredrick Ongunyo to protect his Proprietary rights.
84. In the case of *Miller v Minister Of Pensions* [1947]2 All ER 372 cited by the Court of Appeal in *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] e KLR, the court stated as follows on the



degree of proof “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

85. In conclusion I find that the plaintiffs have failed to prove that about 500 members of Dandora off Kangundo Road Self Help Group were dispossessed of their plots by owing to the acts of fraud of the defendants.

86. They have failed to prove their case against the defendants on a balance of probabilities.

87. Accordingly, the plaintiffs’ suit is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9TH DAY OF NOVEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Omino for the Plaintiff.

N/A for the Defendants.

