



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO. 91 OF 2019

SAMWEL CHEBOI & 3 OTHERS.....PLAINTIFFS

-VERSUS-

PAUL KANDA & 4 OTHERS.....DEFENDANTS

RULING:

1. This is a ruling in respect of a preliminary objection brought by the Defendants based on the following grounds:-

1. **THAT** the suit offends the provision of order 1. Rule 8 and 13 Civil Procedure Rules.

2. **THAT** the Plaintiffs' suit is incompetent and untenable as the Plaintiffs lack capacity to institute these proceedings against the 5 Defendants (Kapkoimur Clan).

3. **THAT** the Plaintiffs' suit is therefore defective, misconceived frivolous and vexatious.

2. The Defendants contend that the Plaintiffs have brought this suit against them without complying with the provisions of order 1 Rule 8 and 13 of the Civil Procedure Rules. The Defendants argue that as the Plaintiffs are suing on behalf of Kaptui Clan, they ought to have complied with the aforesaid provisions as the suit is a representative suit.

3. The Defendants further argue that the Plaintiffs have not specified the land over which they have filed this suit or even its location and acreage.

4. The parties were directed to file written submissions in respect of the preliminary objection. The Defendants filed their submissions dated 6th October, 2021. The Plaintiffs filed theirs dated 1st November, 2021. I have carefully considered the submissions of the parties. The only issue for determination is whether the suit herein is incompetent on account of failure to comply with order 1 Rules 8 and 13 of the Civil Procedure Rules.

5. Order 1 Rule 8 of the Civil Procedure Rules provides as follows: -

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 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 sub rule (1) may apply to the Court to be made a party to such suit.

6. Order 1 Rule 13 of the Civil Procedure Rules provides as follow:-

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.

7. In support of their contention, the Defendants relied on the case of *Kahindi Katana Mwango & Another -Vs- Cannon Assurance (K) Ltd (2013) eKLR* where the Court stated as follows:-

“indeed, Order 4 Rule 4 of the Civil Procedure Rules requires that the Plaintiffs sues in a representative capacity, the plaintiff 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 incurably defective. As at the time of filing the suit, the Plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of “JEURI COMMUNITY BASED ORGANISATION” or on behalf of 41 other in accordance with the provisions of order 1 Rule 13 of the Civil Procedure Rules, 2010. The Applicant cannot just annex a list of the inhabitants on whose behalf the purports to be acting which is not signed by any of persons listed herein.”

8. The Defendants also relied on the case of *Yiapas Ole Seese & 4 others -Vs- Sakita Ole Narok & 2 others (2008) Eklr* where the Court of Appeal stated as follows:-

“The whole purpose of provisions of Order 1 Rule 8 is to ensure that all persons with unlitigated similar cause of action are desirous of having their cause determined are included in this suit for their own convenience and to obviate a multiplicity of suits. Hence the need to notify them of the Institution of the suit so that in case any of them wishes to take part he is given the opportunity to do so.....Until notices under orders 1 Rule 8 Civil Procedure Rules, are served, one may not know whether or not they will accept being treated as Plaintiffs. Services of the notice as we stated earlier. It to give them an opportunity to make an election whether or not to become parties.”

9. The Plaintiffs on their part relied on the case of *Ahmed Dolai & others* suing on their behalf and on behalf of 27 members of Likoley Farmers *-Vs- Kengen & another (2018) Eklr* where the Court held as follows:-

“...that the spirit of the law in requiring notice to be given to persons likely to be affected in the case of representative nature is a procedural requirement that cannot be elevated to a fetish for non compliance. The rule should not be treated as a rigid matter of principle but a flexible tool of convenience in the administration of justice to the parties...”

10. The Plaintiffs also relied on the case of *Jack Mukhongo Munialo -Vs- Nzoia Sugar Company Ltd & another (2017) Eklr* where the Court stated as follows:-

“...the above in my view is not a reason to strike out the entire suit taking into account that it is not fatal at this stage since the suit is still in its infancy stage and giving due regard to Article 159 of the Constitution. The Plaintiff still has opportunity to comply...”

11. There is no doubt that the Plaintiffs’ suit is a representative suit. The Purpose of order 1 Rule 8 of the Civil Procedure Rules was to alert members who have a common interest in a suit to apply to be joined in the suit. In the instant case, the dispute herein involves two clans. There have been efforts to mediate the dispute which did not succeed. This suit was brought to Court and the clan members involved were aware. They gave their authority in writing which though filed late suffices for purposes of compliance with order 1 Rule 13 of the Civil Procedure Rules.

12. In the case of *Kahindi Katama Nwango (Supra)*, the list which was presented to Court was not even signed. This explains why the suit was found to be incompetent. The Court of Appeal decision in the case of *Yiapas Ole Seese (Supra)* was determined pre 2010 Constitution when matters were being dismissed on technicalities.

13. I am persuaded by the decisions cited by the Plaintiffs as they reflect the true spirit of the 2010 Constitution which guarantees litigants a hearing without undue regard to procedural technicalities. The Defendants had been sued in their capacity as representatives of Kapkoimur Clan. They filed a counter claim but they did not comply with order 1 Rule 8 and 13 of the Civil Procedure Rules which they blame the Plaintiffs for. A counter claim is in law is a separate suit.

14. In this era, Courts should be hesitant to strike out cases on procedural technicalities unless what is omitted goes to the root of the case. I therefore find no merit in the preliminary objection which is hereby dismissed with costs to the Plaintiffs. For good order, the authority to plead dated 9th December, 2018 and filed in Court on 4th June, 2021 is hereby deemed as having been properly filed together with the plaint. The Plaintiffs in the counter claim are also given leave to file their authority to plead within 30 days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF MARCH, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Ms. Misoi for Defendant.

Ms. Koskei for Ms. Kemboi for Plaintiff.

Court Assistant –Albert

E. OBAGA

JUDGE

3RD MARCH, 2022