Dibondo & another v Otigo (Suing for and on behalf of Members formerly of Bumala FSA) (Civil Appeal E034 of 2022) [2025] KEHC 6269 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CIVIL APPEAL E034 OF 2022

WM MUSYOKA, J

MAY 14, 2025

BETWEEN

DIDACUS OYULA DIBONDO ..... 1ST APPELLANT

BUMALA FINANCIAL SERVICES ASSOCIATION ..... 2ND APPELLANT

AND

DAMIAN OKONYA OTIGO (SUING FOR AND ON BEHALF OF MEMBERS FORMERLY OF BUMALA FSA) ..... RESPONDENT

(An appeal arising from the decree in the judgement of Hon. Mrs. Lucy Ambasi, Chief Magistrate, CM, delivered on 31st August 2022, in Busia CMCCC No. 88 of 2016)

JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellants, for immediate payment of share contributions, voluntary savings, retained earnings, building fund and dividends for the fiscal year 2012, at the sum of Kshs. 572,872.00, with interest at prevailing bank rates on the said amount from 2013, and costs of the suit. The suit was allegedly brought on behalf of members of the 2nd appellant, who claimed that they had not been paid dividends for the year 2012, after they had established a separate branch, at Luhano, from the 2nd appellant. The complaint was also that their share contributions, building fund, retained earnings, dividends and savings had not been transferred to the new branch.

2. The appellants file a defence and counterclaim. Although they denied the averments made in the plaint, they averred that it was unclear who the plaintiffs were, and the respondent did not have the authority of the alleged members that he represented in the suit, since they were undisclosed. They averred that the Luhano branch had been properly established, and a handover had been properly done. They further averred that they had agreed with the officials of the Luhano branch to do a reconciliation of accounts, but there was lack of cooperation. They pleaded that the respondent was non-suited. The

appellants counterclaimed for assets, cash unpaid loans and interests prior to and up to the date of handover, totalling Kshs. 11,281,556.00.

3. A trial was conducted. The respondent testified and called 2 witnesses. The 1st appellant testified and called 2 witnesses. Judgement was delivered, on 31st August 2022, allowing the claim as prayed.

4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 29th September 2022, revolve around the trial court erring in dismissing the counterclaim and allowing the suit; dismissing the counterclaim as an afterthought yet it was raised in the amended defence; disregarding the evidence placed before it; misapplying and disregarding both the substantive and procedural law; and making an award of costs in favour of the respondent.

5. Directions were given, on 20th January 2025, for disposal of the appeal, by way of written submissions. Both sides have filed written submissions. The appellant submits on three fronts: capacity of the respondent to bring the suit, the evidence adduced at trial, and the assets. The respondent argues two points: whether the appeal is merited and whether the trial court considered the counterclaim.

6. The appellants submit that the respondent had framed his plaint as a representative suit, on behalf of 180 others, which they impleaded , in their defence, that it was unclear who the plaintiffs were, making it difficult for them to properly respond to the suit. It is argued that the trial court did not address itself to that issue, and it was on that issue that the appellants, in the memorandum of appeal, argue that the trial court disregarded both substantive and procedural law. They cite Order 1 rule 8 of the Civil Procedure Rules, Kipsiwo Community Self Help Group vs. Attorney General & 6 others [2013] eKLR (Sila, J) and Rose Florence Wanjiru vs. Standard Chartered Bank of Kenya Limited & 2 others [2014] KEHC 7501 (KLR) [2014] eKLR (Gikonyo, J), to argue that it was unclear who the real plaintiff was in that suit, and, if the suit was representative, whether the person who initiated it had authority from the rest to bring it on their behalf.

7. On the evidence, the appellants submit on the case by the respondent, as the plaintiff at the trial, and the appellants, as the defendants at the trial.

8. They make two points, with respect to the case by the respondent. Firstly, that the plaintiffs were unknown, for their names were never disclosed, and no authority was tabled from them to allow the respondent to prosecute the case on their behalf. It is argued that it was unclear who the orders made in the case were meant to benefit. Secondly, there was no tabulation on how the figure of Kshs. 572,872.00 was arrived at, for the individual share contributions, voluntary savings, retained earnings, building funds and dividends were not determined. It is further submitted that it was difficult to determine and identify the individual claims of each of the 180 alleged plaintiffs.

9. On their own case at trial, the appellants submit that the trial court had concluded that the counterclaim was an afterthought, yet they had presented evidence to support it, which the trial court overlooked. They argue that had the trial court considered the evidence tendered at trial, in support of the counterclaim, it would have reached a different conclusion, and costs would not have been awarded against them.

10. On his part, the respondent supports the judgement of the trial court. He argues that there was evidence to support his case, and cites National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Limited & another [2001] eKLR (Tunoi, Shah & Keiwua, JJA), to argue that courts cannot rewrite contracts on behalf of the parties, and Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] KECA 284 (KLR) (Omolo, Tunoi & Lakha, JJA), for the point that a party who is in breach cannot obtain an injunction for breach of covenant. He submits that he proved his case to the required standard. On the counterclaim, he submits that the same was not proved to the required standard, and

cites section 107 of the *Evidence Act*, Cap 80, Laws of Kenya, and John Edward Ouko vs. National Industrial Credit Bank Limited [2013] eKLR (Kasango, J).

11. There is only one issue, in my estimation, for determination, and that is whether there was a proper suit before the trial court, for grant of the orders made. Once that question is answered, it would dispose of whether there was foundation for the counterclaim.

12. The case by the respondent, going by the amended plaint, filed on 16th July 2019, amended on 15th July 2019, had been brought on behalf of the respondent and 180 others. The claim was for money, Kshs. 572,872.00, to be paid to the plaintiffs, which I suppose meant the respondent and the 180 others. The amount claimed, of Kshs. 572,872.00, was not due to the respondent as a person or individual. It was alleged to be due to him and 180 others. The amount due to him, out of that Kshs. 572,872.00, was not defined in his pleadings, nor in his testimony before the trial court, nor in the judgement rendered by the trial court. Similarly, the amounts due to each of the other 180 individuals were not defined in the pleadings, nor in court, nor in the judgement.

13. As paragraph 2 of the amended plaint is plain, that the suit was purported to have been brought in a representative capacity, issues should have arisen as to whether the respondent had the requisite capacity to prosecute for recovery of the sum of Kshs. 572,872.00, on behalf of or for the benefit of all the 180 individuals purported to be plaintiffs. For avoidance of doubt, paragraph 2, of the amended plaint, reads: "The Plaintiff has brought this suit on his own behalf and on behalf of 180 other former members of Bumala FSA."

14. Ideally, a person can only sue on their own behalf, to advance claims personal to themselves. Where a suit must be commenced on behalf of others, there are protocols to be adhered to. Where an individual sues on behalf of an organisation, which is not an artificial legal person, on account of not being incorporated, the capacity in which he brings the suit must be disclosed, that he is an official of that organisation, and at trial evidence tabled of that capacity. See Kituo Cha Sheria vs. John Ndirangu Kariuki & another [2013] KEHC 21 (KLR) (Kimondo, J) and Kipsiwo Community Self Help Group vs. Attorney General & 6 others [2013] eKLR (Sila, J). A person suing on behalf of a person under disability, a child or person of unsound mind, for example, that must be pleaded, and for a child, reflected in the intitulment, and at trial evidence submitted of the relationship, between the person suing and the person under disability. To defend a suit on behalf of a person under disability, the person defending on behalf of the disabled person should do so as guardian ad litem, and evidence of that capacity ought to be availed at trial. Such a person would be litigating for the other in a fiduciary capacity, and there should be accountability and transparency issues around it.

15. In the instant matter, the respondent did not purport to bring the suit on behalf of the alleged Luhano FSA Sacco, but on behalf of some 180 individuals, said to be members of that organisation or society. In such circumstance, Order 1 rule 8 of the Civil Procedure Rules would apply, where it is permissible for one person to sue or defend a suit on behalf of others in same interest.

16. Order 1 rule 8 provides:

> " 8. One person may sue or defend on behalf of all in same interest
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> (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 subrule (1) may apply to the court to be made a party to such suit".

17. Order 1 rule 8(1) is in permissive terms. Nothing stops a person filing suit, where he claims on behalf of himself and others. However, Order 1 rule 8(2) is in mandatory terms. See Rose Florence Wanjiru vs. Standard Chartered Bank of Kenya Limited & 2 others [2014] KEHC 7501 (KLR) [2014] eKLR (Gikonyo, J). Where such a suit is filed, in terms of Order 1 rule 8(1), the person filing it is required, after filing it, to give notice to all the persons, on whose behalf he claims or purports to have brought the suit. Such notice should be served either personally, or by substituted service through public advertisement, as may be directed by the court. Order 1 rule 8(3) is permissive. It enables any person, on whose behalf or for whose benefit the suit is filed, to apply to court, to be added or joined as a party. It presupposes both a party who becomes aware of the existence of the suit, through the notice under Order 1 rule 8(2), and one who has not received the notice, contemplated in Order 1 rule 8(2), but somehow gets to know of the existence of the suit by other means. See Rose Florence Wanjiru vs. Standard Chartered Bank of Kenya Limited & 2 others [2014] KEHC 7501 (KLR) [2014] eKLR (Gikonyo, J).

18. Order 1 rule 8(2) guards against litigation being mounted on behalf of individuals, without their knowledge, consent or authority. Crucially, it protects against fraud, where individuals pursue litigation on behalf of persons who are unaware of the cause or matter, for there would be a real spectre, at successful conclusion of the proceedings, of those persons not benefitting from the awards made by the court. There is also the possibility of such suits being prosecuted on behalf of non-existent persons. Order 1 rule 8(2) addresses that mischief, by having notifications going out to those on whose behalf the suit is brought, who would then come on board through Order 1 rule 8(3), by joinder or addition. A person, who does not seek and obtain addition or joinder to a suit, under Order 1 rule 8(3), does not become a party to the suit, and no orders ought to be made in its favour or against it.

19. So, what should happen, where there is no compliance with Order 1 rule 8(2), in circumstances where notices are not given to individuals, for whose benefit the suit is purportedly brought? The law does not allow one person to bring and prosecute a suit on behalf or for the benefit of another, without the knowledge or consent of that other. That is what Order 1 rule 8(3) seeks to cure. Where there is non-compliance with Order 1 rule 8(2), the suit would still be competent, for the purposes of the person bringing it, if the orders sought would benefit him, but it would be incompetent, with respect to the other persons on whose behalf it is brought, who have not been added or joined to it as plaintiffs. Ideally, the court ought to strike out the suit, as it relates to those others, and maintain the portion of it relating to the plaintiff, if, on account of the prayers sought, the same is still maintainable. If no striking out happens, and the suit is prosecuted to the end, then no orders would lie against the defendant, with respect to the persons who had not been added or joined to the suit. Order 1 rule 8 presupposes that the suit on behalf of others is initiated first, and then authority or notices follow.

20. In the instant case, Order 1 rule 8(2) was not complied with. No notice was ever served on the purported 180 others; on whose behalf the suit was purported to have been brought. That meant that those 180 individuals did not get the opportunity to apply for joinder or addition to the suit, as plaintiffs, in terms of Order 1 rule 8(3), and, consequently, they did not become parties to the suit. In the absence of compliance with Order 1 rule 8(2), and the non-addition or non-joinder of the

180 others, the suit could only proceed and be maintained with respect to the respondent, and not the others, and no orders could be made against the appellants, in favour of individuals who had not become parties to the suit.

21. Was the issue, as to whether the said suit was a proper representative suit, before the court, and, therefore, requiring determination by the court? Yes, it was. It was impleaded by the appellants, at paragraphs 3 and 4 of the amended defence. It is averred at paragraph *3* that "the plaintiff has no authority of the alleged undisclosed 280 members or any." And at paragraph *4*, that "it is unclear who the plaintiffs are...," making it difficult for the appellants to respond effectively to some of the averments in that amended plaint. The issue raised by the appellants was pertinent, given that the 180 individuals, on whose behalf the suit was purportedly brought, were not disclosed, in the amended plaint, nor in an attachment to it, the appellants would have been handicapped in effectively responding to claims made by nameless and faceless parties.

22. Order 1 rule 13 of the Civil Procedure Rules is also relevant. It provides as follows:

> " 13. Appearance of one of several plaintiffs or defendants for others
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> (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."

23. The instant suit was framed as a representative suit, under Order 1 rule 8, brought by one person on behalf of others, and as a suit where there were numerous plaintiffs, which brought it within Order 1 rule 13. Ideally, a suit ought not be premised on both provisions. In one, one person brings the suit on behalf of others. In the other, several persons are named as plaintiffs or defendants, but the active conduct of the case is left to one or more of the plaintiffs or defendants.

24. My reading of Order 1 rule 13 is that it envisages a situation where there are several persons named in the pleading as plaintiffs. Order 1 rule 13 permits one of them to play the active role of appearing in court, pleading and acting in the matter. In short, it allows one or more of the plaintiffs, or defendants, as the case may be, to drive the process, while the others take the backseat. The person taking the lead role would have to, according to Order 1 rule 13, be so authorised by the rest, in writing, which authority should be executed by the person giving it and it must be filed in court. Order 1 rule 13 is not necessarily about representative suits, but it applies to any case, where there are more than one plaintiff or defendant. It may apply to representative suits, where individuals join the suit as parties, under Order 1 rule 8(3).

25. In the instant case, the respondent was mixed up, on the nature of the case he was mounting. He appeared to come under both Order 1 rule 8 and Order 1 rule 13. Under Order 1 rule 8, to the extent that he pleaded, under paragraph 2 of his amended plaint, that he was bringing a representative suit, on behalf of 180 others. Under Order 1 rule 13, to the extent that he pleaded, in paragraphs *5*, *6*, *7*, *13*, *14*, *15*, 15a, *16* and in the prayers, that there were other plaintiffs. Yet, the amended plaint, in the title and paragraphs *1* and *2*, referred to only one plaintiff, the respondent herein. The body of the amended plaint did not disclose the name of any other plaintiff, and there was no list, of any other plaintiff or plaintiffs, attached to the amended plaint. The suit was a mongrel, at once brought under Order 1 rule 8 and Order 1 rule 13.

26. Did the respondent comply with Order 1 rule 13, in terms of getting the authority of his alleged co-plaintiffs, to appear, plead and act on their behalf? No written authority was ever filed, signed by the 180 other "plaintiffs." There were, in fact, no other plaintiffs, apart from the respondent, and the issue of complying with Order 1 rule 13 did not and could not arise, for there was no one who could give authority to the respondent, in the manner contemplated.

27. The suit, as conceived and framed, was dead in water. There was no proper suit before the trial court, which could provide a foundation for conducting a trial, and making the orders that were eventually made in the end, in the instant case. The suit could have been salvaged, by way of compliance with Order 1 rule 8(2), by issuing the contemplated notice, and getting the 180 individuals added or joined to the suit; or by compliance with Order 1 rule 13, by adding or joining all the 180 as plaintiffs, and then obtaining their written authority, to allow the respondent appear, plead and act in the matter on their behalf.

28. The appellants submitted on that issue, at the trial, in their written submissions, filed on 25th July 2022, dated 14th July 2022. The first issue, flagged in those written submissions, was on locus standi. It was framed around Order 1 rule 8 of the Civil Procedure Rules. It was argued that Order 1 rule 8(2) was not complied with, which would have enabled the other persons to come in under Order 1 rule 8(3) or Order 1 rule 13 of the Civil Procedure Rules, by filing the requisite authority or consents. It was submitted that the respondent lacked locus standi, in the circumstances, to bring the suit on behalf of anyone else, apart from himself, and it was urged that the suit ought to be struck out, on that account. The respondent did not advert to that issue in his written submissions, filed on 15th June 2022, dated 17th May 2022, at all.

29. In its judgement, of 31st August 2022, the trial court did not advert to the issue of the competence of the suit, or the locus standi of the respondent to initiate the suit on behalf of 180 others, or compliance with Order 1 rule 8, or Order 1 rule 13, despite that issue being flagged in the defence, and being extensively submitted upon by the appellants.

30. Compliance with Order 1 rule 8(2), or Order 1 rule 13, was a preliminary issue, for it went to the core of the matter. It was an issue around the competence of the suit. It also went to jurisdiction, as a court would have no basis for making determinations in favour of persons who were not before it; nor making findings that a defendant was liable, regarding claims by persons who had not been made parties to the suit. It would be a matter of the court expending judicial time on a dead claim. It was an issue that the trial court should have dealt with as a preliminary and primary matter, before it proceeded to examine the merits of the case. As it is, the trial court ignored the core pleadings by the defence and the defence submissions on the matter.

31. The final word on it is that Order 1 rule 8(2) and Order 1 rule 13 are in mandatory terms. The failure to comply with them was fatal, that is if the respondent had desired to base his suit on either of them. The respondent could not prosecute a case, on behalf of individuals, who had not joined it or had been added to it, or who had not authorised him to prosecute it on their behalf. The suit was incompetent, and should have been struck out or dismissed, with costs.

32. Could the suit have been salvaged, on the basis, that the respondent had brought the action on behalf of an unincorporated entity, Luhano FSA Sacco? The respondent did not plead, in his amended plaint, that he was bringing the case on behalf of Luhano FSA Sacco. However, when he testified on 6th July 2021, he produced a document, a demand made by Luhano FSA Sacco, and signed by himself, allegedly on behalf of the management of that entity. He also produced other exhibits, with respect to engagements between Luhano FSA Sacco and the 2nd appellant. His witness, PW2, was emphatic

that they were not in court as Luhano FSA Sacco, but as members of Luhano FSA Sacco and the 2nd appellant.

33. The respondent and his witnesses were conflicted on the nature of the suit that they were prosecuting. The respondent based his claims on documents generated by Luhano FSA Sacco, and appeared to make demands on behalf of Luhano FSA Sacco. His witness, PW2, testified from the standpoint that the suit was not about Luhano FSA Sacco, but its members. However, the language, in the materials that they were relying on, pointed to them prosecuting a case for Luhano FSA Sacco, given that the negotiations they were citing were not between the 181 individuals and the 2nd appellant, but between Luhano FSA Sacco and the 2nd appellant, and the report placed on record said as much. The 181 did not negotiate with the appellants, for the appellants dealt with Luhano FSA Sacco.

34. In any case, the status of registration of Luhano FSA Sacco was not disclosed. Even if it was, the suit, as framed, was not brought on behalf of that entity, and the respondent did not plead or bring the action as an official of that entity.

35. As the suit was incompetent, with respect to non-joinder or non-addition of the 180 persons, in whose benefit it was purportedly brought, the orders sought by the respondent were not available for making in favour of those 180. The only orders that the court could make were those in favour of the respondent, with respect to his own personal claim against the appellants.

36. Was a case made out in favour of the respondent, upon which orders could be pronounced in his favour? I do not think so. This was a money claim, to the tune of Kshs. 572,872.00. That amount was supposed to be due to all the 181, and not just the respondent. In the pleadings, the respondent did not separate his claim from that of the other 180. At the trial, he similarly did not breakdown what was due to him, out of the Kshs. 572,872.00. That would mean that even if the court were to dismiss the case by the 180, and retain that by the respondent, it would have had no basis for making any award in his favour. The evidence adduced did not support a case in his favour.

37. On the counterclaim, I will start by stating that a counterclaim has a life of its own, and can be maintained, even where the suit by the plaintiff is dismissed or struck out. However, I do not think the counterclaim herein would have survived the dismissal or striking out of the suit. In the first place, the counterclaim could only lie against the respondent, for the other alleged plaintiffs were not before the court. They were not parties to the suit, and no orders could issue against them. The counterclaim could not introduce new parties to the suit, for it could only be brought against the parties named in the suit by the respondent. Secondly, as framed, the counterclaim did not make specific allegations and claims against the respondent individually, to enable grant of orders against him. Thirdly, as framed, the counterclaim appeared to target Luhano FSA Sacco, and not the respondent nor the other 180, yet Luhano FSA Sacco was not a party in that suit. If any money were to be found owing, to the 2nd appellant, it would have been by Luhano FSA Sacco, and not the respondent or the other 180, going by the pleadings in the counterclaim.

38. Overall, I find merit in the appeal herein, to the extent of the suit at the trial court being incompetent, with respect to the 180, and unproven as against the appellants, but unmerited with respect to the counterclaim. I shall allow it, with respect to the competence of the suit, and dismiss it with respect to the counterclaim. The final order shall be that the judgement of the trial court, in Busia CMCCC No. 88 of 2016, is hereby set aside or vacated, and substituted with an order dismissing both the suit and the counterclaim, in Busia CMCCC No. 88 of 2016. The appellants shall have the costs of the appeal and of the suit at the court below.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 14TH DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. James Were, instructed by Gabriel Fwaya, Advocate for the appellants.

Mr. Otsiula, instructed by JB Otsiula & Company, Advocates for the respondent.