



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

APPEAL NO. 10 OF 2020

JIMUDU WOMEN GROUP.....APPELLANT

VERSUS

GOSPEL HARVEST MINISTRIES OF

KITALE THROUGH TOM MBOYA.....RESPONDENT

(Being an Appeal against the Ruling of Hon. M.I.G Morang'a, Senior Principal Magistrate in Kitale CMC Land Case No. 57 of 2020 delivered on 16/11/2020)

JUDGMENT

1. The background to the instant appeal is as follows: through Kraido & Co Advocates the respondent filed **Kitale CMC Land Case No. 57 of 2020** against the appellant seeking some orders. The appellant filed a defence through BN Munialo & Co Advocates stating that the suit was a non-starter which should be dismissed or struck out *in limine*, that the suit is *res judicata* and the previous decision has been appealed against among other grounds. Jurisdiction was however admitted.

2. The appellant filed a motion dated **31/8/2020** seeking that the suit be dismissed with costs on grounds of *res judicata* and lack of capacity of the defendant to be sued and that costs be borne by the respondent herein. The application was heard by **Hon M.I.G. Moranga, SPM**, by way of written submissions and dismissed on **16/11/2020** instigating the present appeal.

3. Being dissatisfied with the with the Ruling of **Hon. M.I.G Morang'a (SPM)** delivered on the **16/11/2020** in **Kitale Chief Magistrate's Court** in **Land Case No. 57 of 2020**, the Appellant has appealed to this Honourable Court against the said ruling and sets forth the following grounds of appeal as follows:

(1) That the learned trial Magistrate erred in law and fact in holding that the case was not *res judicata* as the parties were different in the cases.

(2) That the learned trial Magistrate erred in law and fact when she held that though the subject matter in the 2 cases were same, yet the cases was were not *res judicata*.

(3) That the learned Magistrate failed to understand and appreciate the principles of *res judicata*.

(4) That the learned Magistrate erred in law and fact when she held that the appellant was a legal entity which could be sued on the sole reason that there was a certificate of registration.

(5) That the findings of the learned trial Magistrate were against the law.

4. The Appellant prays that the appeal be allowed and the case in the subordinate court be dismissed with costs here and below.

5. On **26/6/2021** the appeal was admitted for hearing and this court gave directions that the same be canvassed by way of written submissions. The appellant filed its submissions on **14/6/2021** and reply to respondent's submissions on **22/6/2021**. The respondent filed its submissions on **16/6/2021**.

6. The main issues that arise for determination in the instant appeal are as follows:

a. Did the learned trial magistrate err in law and in fact in not holding that the suit was *res judicata*?

b. Did the learned trial magistrate err in law and in fact in failing to find that the appellant was not a legal entity having capacity to be sued in its name?

c. Who should bear the costs of this appeal?

7. The basis upon which the learned trial magistrate's decision on *res judicata* is impugned in this appeal is that **Kitale HCCC No 65 Of 2008** existed and it had sought the same orders over the same subject matter and that another suit **Kitale ELC No 113 Of 2012** regarding the same subject matter had been heard and finalised; in the latter suit it had been declared that the respondent was a mere trespasser on the suit land who should be evicted.

8. I have perused the ruling which I gave in the latter case. The 3 plaintiffs in that case acting as the then trustees of the respondent herein had sued one defendant by the name **Kenneth Ainea Muyera** seeking a declaration that he was a trespasser on the same suit land subject of the instant appeal. After the case had been heard in full and was awaiting judgment, the trustees applied to amend the plaint to include the appellant herein as the defendant which this court frowned on as seeking to restart the hearing with an entirely new party as a defendant; the outcome of that application to amend is that this court disallowed the application, noting that the trustees of the respondent herein had admitted that they had no claim against the defendant therein. The suit was dismissed with costs to the defendant in that case.

9. Does that decision warrant the appellant to rely on *res judicata*? I think not. Though the subject matter is the same as that in the instant appeal and the respondent herein was the plaintiff suing through trustees, the respondent herein admitted in that suit that it had been heard substantively but with the wrong party named as defendant and so it is clear that the suit was heard against an entirely different party from the appellant herein. I find that in those circumstances, there is no need to establish if the other conditions requisite for *res judicata* obtain. The case against the appellant herein was never heard and determined on its merits. The ground that the learned trial magistrate erred on failing to find that the suit was *res judicata* must fail.

10. As regards whether the appellant is a legal entity capable of being sued it has been long established that unincorporated groups must be sued through their trustees or officials. This was emphasized in the case of **Kipsiwo Community Self Help Group Vs Attorney General and 7 others [2013] eKLR**.

11. The respondent cited the case of **Scholar Munyithya Kulu V Syondo Mathunyani Women Self Help Group [2016] eKLR** and submitted that the appellant had capacity to be sued.

12. It was argued, citing the decision in **Films Rover International 1986 3 ALL.E.R.** that a fundamental principle of law is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong and that therefore this court is not bound by the set legal principles. It was argued that the situation can be cured by amendment.

13. Further, the decision of **DT Dobie vs Muchina 1980 eKLR** was relied on for the proposition that a court of law should aim at sustaining a suit rather than terminating it by summary dismissal.

14. Lastly **Order 1 Rule 9** was relied on for the proposal that no suit shall be defeated solely by reason of misjoinder or non-joinder of parties and that the court should determine the matters in controversy so far as regards the rights and interests of the parties actually before it.

15. To further support that view, it is averred that in her statement in the court below the chairlady of the group had introduced herself as the chair of the group and she can therefore disclose the other two office bearers and thus the suit can be amended to include more defendants as officials.

16. However it is not indicated that any application has been made in the court below and certainly no application to order the joinder in the suit in the court below of anyone else as a defendant has been filed in this appeal, perchance were that possible. This court would have considered those as mitigating circumstances and turned away from issuance of an order of dismissal.

17. Lastly, concerning the submission that **Order 1 Rule 9** warrants that no suit shall be defeated solely by reason of misjoinder or non-joinder of parties and that the court should determine the matters in controversy so far as regards the rights and interests of the parties actually before it, I must caution the respondent that that is the approach that this court took when it determined **Kitale ELC No 113 Of 2012**. However the respondent does not appear to have learnt the lesson of enjoining the right parties leading to the instant case. In the instant case I reiterate that had an application been on the record in this appeal or in the court below for joinder I would have adopted the "*lesser evil*" approach espoused in the **Films Rover Case (supra.)** As things stand, despite all signals as to impropriety of joinder in the suit in the court below, the respondent never took any remedial action and this court and the other parties can not know the true intent of the respondent as far as joinder of parties is concerned. The matter of whether joinder will occur or not can not be left to guesswork or the whim and caprice of the respondent.

18. The appellant could not therefore be competently sued in its own name alone, and the suit against it was fatally defective for that reason.

19. Consequently the instant appeal succeeds on the second ground alone that the appellant had no capacity to be sued.

20. Consequently I find that the instant appeal has merit. I therefore allow the appeal and I issue the following order:

a. The order of the Hon MIG Moranga issued on 16/11/2020 dismissing the appellant's Notice of Motion dated 31/8/2020 is hereby set aside and substituted with an order dismissing the suit in Kitale CMC Land Case No. 57 of 2020 with costs to the defendant therein.

b. The costs of this appeal shall be borne by the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2021.

MWANGI NJORGE

JUDGE, ELC.