



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 341 OF 2019**

***(FORMERLY KAJIADO ELC CASE NO. 186 OF 2018)***

**KASAINO OLE SELEKA..... 1ST PLAINTIFF**

**JAMES MOKOIRE MOONKA.....2ND PLAINTIFF**

**JOHN MILIA MULI ..... 3RD PLAINTIFF**

**KILELO OLE SIETA..... 4TH PLAINTIFF**

**MANINA RILOYIAN ..... 5TH PLAINTIFF**

**VERSUS**

**DANIEL KIRIA LETURESH..... 1ST DEFENDANT**

**ELIJAH KEEN NAINI..... 2ND DEFENDANT**

**JOSEPH KIPAIPAI NTAANI..... 3RD DEFENDANT**

**EUSTACE N KITHUMBU..... 4TH DEFENDANT**

**JOSIAH K. LESSAN..... 5TH DEFENDANT**

**DIRECTOR OF LAND ADJUDICATION**

**AND SETTLEMENT..... 6TH DEFENDANT**

**MINISTRY OF LANDS AND PHYSICAL PLANNING**

**COUNTY SURVEYOR KAJIADO ..... 7TH DEFENDANT**

**REGISTRAR OF LANDS KAJIADO.....8TH DEFENDANT**

**DIRECTOR OF PHYSICAL PLANNING**

**KAJIADO COUNTY..... 9TH DEFENDANT**

**REGISTRAR OF COMMUNITY LAND..... 10TH DEFENDANT**

**RULING**

**Introduction**

1. Two items fall for determination in this ruling. The first item is the notice of preliminary objection by the 1st, 2nd and 3rd defendants,

dated 25/1/2021. The second item falling for determination is the notice of motion by the 1st, 2nd and 3rd defendants dated 25/1/2021. I will dispose the two items sequentially in the above order.

#### **Notice of Preliminary Objection dated 25/1/2021**

2. The objectors in the notice of preliminary objection dated 25/1/2021 itemized the following verbatim grounds of objection.

*a) The plaintiffs' case and the entire proceedings herein have been filed in contravention of the mandatory provisions of Regulation 26(7) of the Community Land Regulations, 2017, passed in exercise of Section 48 of the Community Land Act, 2016 (No. 27 of 2016) Laws of Kenya.*

*b) The plaintiffs' case against the defendants is premature, misconceived, incompetent, a complete nullity and an abuse of this honourable court's process as the same was filed in contravention of the mandatory provisions of Regulation 26(7) of the Community Land Regulations, 2017.*

*c) Further, by reason of the aforesaid provisions of the Community Land Act, 2016 (No. 27 of 2016) and Community Land Regulations, 2017, the honourable court should not entertain the suit and proceedings herein, which should therefore be struck out with costs to the 1st to 3rd*

*defendants.*

3. Canvassing the objection, Mr Mukeli, counsel for the objectors (1st to 3rd defendants) submitted that Regulation 26(7) of the Community Land Regulations 2017 required that groups that had applied for dissolution and had been allowed to dissolve were to do so within three years. Counsel contended that **Olgulului Olorashi Group Ranch** applied for dissolution in 2006 and the Director of Land Adjudication issued a certificate in the same year. Counsel contended that the suit herein was commenced prematurely because the statutory period had not lapsed. It was the position of the objectors that the plaintiffs should have allowed the dissolution process to complete. Counsel added that the Group Ranch was not a registered community as contemplated under the Community Land Act 2016 and therefore the provisions of the Act did not apply to the Group Ranch. Counsel urged the court to dismiss the plaintiffs' suit for contravening Regulation 26(7) of the Community Land Regulations, 2017.

4. Responding to the preliminary objection, Ms Koki Mbulu, counsel for the plaintiffs submitted that the grounds raised in the notice of preliminary objection were not points of law because they required to be ascertained through the production of evidence. Counsel contended that the grounds did not meet the threshold of a preliminary objection as outlined in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. Counsel added that reference to resolutions by members of the Group Ranch and to the certificate of dissolution were factual matters that required evidence.

5. I have considered the tenor and import of the grounds outlined in the notice of preliminary objection. I have also considered the rival submissions by counsel. Further, I have considered the prevailing jurisprudence on what constitutes a preliminary objection. Two questions fall for determination in the notice of preliminary objection. The first question is whether the grounds raised and canvassed in the preliminary objection are points of law capable of disposing this suit on the platform of a notice of preliminary objection. If the answer to the above question is in the affirmative, the second question would be whether there is merit in the grounds outlined and canvassed in the notice of preliminary objection dated 25/1/2021.

6. The gist of the three grounds outlined in the notice of preliminary objection is that this suit was filed in contravention of the mandatory provisions of Regulation 26(7) of the Community Land Regulations, 2017. Regulation 26 contains the framework on conversion of a group representatives to a community within the meaning of the Act. Rule 7 of Regulation 26 provides thus:

*"26(7) The groups that have applied for dissolution and have been issued with certificate of dissolution shall be allowed to finalize the process within three years."*

7. Counsel for the three objectors contended that **Olgulului Olorashi Group Ranch** applied for dissolution in 2006 and the Director of Land Adjudication issued a certificate of dissolution in the same year. Counsel contended that this suit was filed prematurely because the 3 years period granted by the Act had not lapsed. I have reflected on that point. It is clear, and I agree with counsel for the plaintiffs, that the point which the objectors purported to canvass on the platform of a notice of preliminary objection is one that required evidence relating to application for dissolution; existence of a certificate of dissolution issued by the relevant authority under the repealed **Land (Group Representatives) Act, Cap 287**; and minutes relating to the dissolution process. It is a point which would require a notice of motion supported by an affidavit and exhibits.

8. **Sir Charles Newbold P** in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** outlined what constitutes a preliminary objection in the following words:

*"A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all 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. The improper raising of points by way of preliminary objection increase costs and, on occasion confuse issues. The improper practice should stop."*

9. On my part, I would add that a point which requires ascertainment through production of evidence is not a ground to be canvassed on the platform of a notice of preliminary objection. Where a party desires to canvass a point that would dispose a suit but the point requires presentation of evidence in form of exhibits, the appropriate platform on which to canvass the point is a formal application supported by an

affidavit together with appropriate exhibits.

10. Consequently, my finding on the first question in the notice of preliminary objection dated 25/1/2021 is that the grounds raised and canvassed in the preliminary objection are not points of law capable of disposing this suit on the platform of a notice of preliminary objection. They are grounds that require supporting evidence. Having come to the above finding on the first question, the second question becomes moot. Consequently, the notice of preliminary objection dated 25/1/2021 is rejected on the above ground. Costs shall be in the cause. I now turn to the application dated 25/1/2021.

11. Through the application dated 25/1/2021, the 1st to 3rd defendants seek an order striking out the amendments made in the plaintiffs' further amended plaint dated 18/12/2020 that do not conform to the order made by this court on 25/11/2020. The case of the applicants is that those amendments exceeded the scope of the order made on 25/11/2020 and were made without leave of the court.

12. Canvassing the application in the virtual court, Mr Mukeli, counsel for the applicants, submitted that on 25/11/2020, the court rendered a ruling in which it suspended the subdivision of the Group Ranch's land and directed the plaintiffs to amend the plaint and join the Registrar of Community Land as a party to this suit. Counsel added that the plaintiffs made several other amendments and joined several other parties that were not authorized by the court. Counsel submitted that the plaintiffs filed a further amended plaint dated 18/12/2020 without leave of the court. Counsel contended that pleadings in this suit closed in June 2019, hence the unauthorized amendments and joinder were illegal.

13. In response, Ms Koki Mbulu, counsel for the plaintiffs submitted that the order made by the court on 25/11/2020 directing the plaintiffs to join the Registrar of Community Land as a party to this suit did not restrict the plaintiffs against joining other parties or effecting other amendments. Counsel contended that while effecting joinder as ordered by the court, the plaintiffs realized that joinder of other parties was necessary for the complete and effectual adjudication of the dispute. Counsel submitted that there was no prejudice to be suffered by the defendants. Counsel argued that amendments should be freely allowed provided they do not result in injustice. Urging the court to be guided by Order 1 rule 10(2) of the Civil Procedure Rules, counsel urged the court to dismiss the application.

14. I have considered the application together with the response thereto and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence. The single question falling for determination in the application dated 25/1/2021 is whether the amendments and joinders effected by the plaintiffs outside the purview of the order of 25/11/2020 should be struck out.

15. The order dated 25/11/2020 authorizing the plaintiffs to amend the plaint reads as follows:-

***“(b) The plaintiff shall amend the plaint to join the Registrar of Community Land as a party to the suit.”***

16. The original plaint was dated 17/11/2018. On 23/12/2019, the plaintiffs filed an amended plaint dated 12/11/2019. The further amended plaint is dated 18/12/2020. On 3/6/2019, the 1st to 3rd defendants filed a statement of defence dated 31/5/2019. On 2/4/2019, the 4th, 5th and 6th defendants filed a statement of defence dated 28/3/2019. The 7th to 9th defendants filed a statement of defence dated 9/9/2020. (It is not clear why the 7th to 9th defendants are not represented by the Attorney General).

17. There is common ground that besides joining the Registrar of Community Land as a party to this suit, the plaintiffs joined seven (7) other defendants. It is also not disputed that several amendments were made to the amended plaint. Those amendments relate to the seven other persons who were made defendants in the suit.

18. Under Order 8 rule 3 of the Civil Procedure Rules, the trial court is granted discretionary jurisdiction to grant leave to a party, upon application by that party, to amend pleadings. In the present suit, the plaintiffs were directed to amend their pleadings to join the Registrar of Community Land as a party to this suit. They proceeded to effect other unrelated amendments and added seven (7) other defendants without bothering to apply to the court for requisite leave. This was done in contravention of the framework in Order 8 of the Civil Procedure Rules which regulates the right of a party to amend pleadings.

19. At the time of canvassing the present application, no formal application had been presented to the court to regularize the irregular amendments. Counsel for the plaintiffs submitted that amendments should be freely allowed provided they do not result in an injustice. While I agree with counsel for the plaintiffs that leave to amend pleadings should not be unreasonably withheld, I do not think our civil procedure rules and the guiding principles on joinder and amendments would countenance a situation where, upon close of pleadings, a party casually effects amendments and joinder without any prior leave of the court. If the plaintiffs found it necessary to join more parties and to effect further amendments to their pleadings, all they needed to do was to bring and canvass an application for leave. They did not do that and they have not done that to date. The result is that the irregular joinder and amendments reflected in the further amended plaint stand to be struck out.

20. For the above reasons, the notice of preliminary objection dated 25/1/2021 and the notice of motion dated 25/1/2021 are disposed as follows:-

***a) The notice of preliminary objection dated 25/1/2021 is rejected on the ground that it raises points that require supporting evidence.***

***b) Costs of the preliminary objection shall be in the cause.***

***c) The joinder and amendments in the plaintiffs' further amended plaint dated 18/12/2020 relating to the 11th to 17th defendants are struck out for having been effected without leave of the court.***

***d) Costs of the application dated 25/1/2021 shall similarly be in the cause.***

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF OCTOBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Ms Koki Mbulu for the Plaintiffs

Mr Mukeli for the 1st to 3rd Defendants

Mr Onyango for the County Government of Kajiado

Mr. Mutai for the Intendent Interested Party

Court Assistant: Lucy Muthoni

**NOTE:**

*This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.*

**B M EBOSO**

**JUDGE**