



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HIGH COURT CIVIL APPEAL NO. 83 OF 2018

1. GABRIEL ODUOR

2. FASILIANO WANGALWA

3. SEBASTIANO MUNYEKENYE

4. STANSLAUOS OMBUNDA

5. BENDETTA MUNYEKENYE.....APPELLANTS

VERSUS

1. GABRIEL OTIMA LUKAS

(ORGANIZING SECRETARY ABAKHIBE CLAN

2. JOHN KAU (SECRETARY, ABAKHIBE CLAN.....RESPONDENTS

(An Appeal from ruling in original CMCC 430/2018 delivered by C.A S Mutai Principal Magistrate dated 8.11.2018)

JUDGMENT

This is an appeal from the ruling of the trial magistrate in application by the appellants dated 5th September 2018 where they sought:-

- a) That the suit filed on 7/12/2017 be struck out and or dismissed.***
- b) That costs of this application be provided for.***

Which application is premised on the affidavit of SEBASTIAN MUNYEKENYE on the following grounds.

- 1. That the suit filed on 7.12.2017 is incompetent, fatally defective, frivolous and an abuse of the court process.***
- 2. That the plaintiffs/Respondents lack locus standi to maintain the suit before this honourable court.***
- 3. That the plaintiffs/Respondents have brought the suit in their capacities as organizing secretary and secretary of the Abakhibe Clan respectively.***
- 4. That Abakhibe Clan, which is neither registered nor incorporated, is not a person as contemplated in law.***
- 5. That the Plaintiffs/Respondents are unable to maintain a suit on behalf of an entity not known to law.***
- 6. That it is prudent in the circumstances, that the suit be dismissed.***

The learned trial magistrate after considering the application by ruling dated 8th November, 2018 ruled:

“ In this matter the defendants had presented application dated 5th September 2018 where orders sought was that of striking off of the plaint where it was held by the defence counsel that the suit was bad in law and incompetent for the office of organizing secretary. Abakhibe clan secretary are not legal persons. The plaintiff opposed this application where it was contended that the application lacks merit.

I am however of the view that even if Abakhibe clan is not a registered organizing which can be sued or sue the plaintiff can sue as personal individual who have the capacity to sue and be sued. The plaintiff therefore has a capacity to sue as individual persons who shall be liable as individual and not clan members or officials. I am also of the further view that subsequent applications can be made where the plaintiffs can enjoin the other members into this suit which application can be made under the rules.”

Aggrieved by the ruling the appellants filed this appeal on the main grounds.

1. That the trial learned magistrate erred in law and in fact in holding that the Respondents have the necessary locu standi to bring and maintain Bungoma Chief Magistrate’s court civil case NO. 430 of 2017 on behalf of Abakhibe Clan.

2. That the trial learned magistrate erred in law and in fact in holding that deficiency in legal capacity can be cured by reference to article 159 of the Constitution of Kenya 2010.

Briefly, the Respondent and Appellants are members of the Abakhibe clan. The Respondents are the organizing secretary and Clan secretary respectively. By plaint dated 4.12.2017 the respondent filed Civil suit NO. 430/2017 seeking certain orders in particular an order for exhumation of one GODFREY MUNYEKENYE (deceased) who was a member of the clan, who had been buried by the defendants to enable the Respondents to rebury the said Godfrey in a seated position in accordance with the customs and tradition of Abakhibe clan to which he belonged.

The Appellant challenged the locus of the Respondents to file maintain and prosecute the suit. In the application dated 5th September 2018, whose determination precipitated this appeal.

Both the appellant and respondents in their pleading admit that the deceased Godfrey Munyekenye was born into the Abakhebi clan. He was therefore a member of the clan. The only issue was whether he had ascribed to Christian faith and embraced the same in his lifestyle. This is an issue which will be the basis of the suit filed by the Respondents.

Having admitted that the deceased was a member of the clan, the members of the clan had therefore sufficient interest in how he is buried. The clan members can therefore sue as clan or jointly and severally in a suit. Even if I was to accept that the clan is not incorporated, they would still have sufficient interest and therefore locus to either jointly or severally sue.

I consequently do not find merit in this appeal which is hereby dismissed. Each party to bear his own costs.

Dated and Delivered at Bungoma this 5th day of February, 2021

S.N. RIECHI

JUDGE