



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C APPEAL NO. 30 OF 2019**

**DAVID OMWANCHA MANDUKU.....APPELLANT**

**VERSUS**

**FRANCIS GEKONGE OMINDI.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant filed this appeal against the judgment of Hon. Kahara- Resident Magistrate in Keroka PMCC No. 5 of 2015 delivered on the 13<sup>th</sup> day February 2013. In the said suit, the Appellant (plaintiff) had filed suit against the Respondent (defendant) for trespass in respect of land parcel no. NYARIBARI/MASABA/BOKIMOTWE 11/506 belonging to Ramasha Co-operative Farmers Society Limited. In dismissing the suit, the trial court noted that the Appellant lacked locus standi as he had no authority to sue on behalf of the said Cooperative Society.

2. Being aggrieved by the said judgment, the Appellant filed this Appeal citing the following grounds:

1. The learned trial magistrate erred in law in holding that the Appellant herein did not have locus standi to sue in this suit as he ought to have obtained authority to sue from the members.
2. The learned trial magistrate misdirected herself in deciding on issues that were not directly in controversy from the pleadings and the evidence that was adduced by the parties to the suit and thereby arrived at the wrong decision.
3. The learned trial magistrate erred and misdirected herself in deciding the case against the weight of the evidence in this suit.

The parties agreed to canvass the appeal by way of written submissions and while the appellant's advocate filed his submissions, the respondent's advocate did not file any.

**ISSUES FOR DETERMINATION:**

3. Having considered the Memorandum of Appeal, judgment of the lower court and the rival submissions, the following issues arise for determination:

- i. Whether the Appellant had locus standi to institute the suit in the lower court.
- ii. Whether the trial magistrate based her determination on issues that were not in controversy and if so, whether she arrived at a wrong decision.

**ANALYSIS AND DETERMINATION**

**Whether the Plaintiff had locus standi to sue the defendant**

4. In his submissions counsel for the Appellant argued that the trial magistrate erred in holding that the Appellant had no locus standi to sue. He relies on Order 1 rule 8 of the Civil Procedure Rules which provides as follows:

**“ 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 except one or more of them”**

5. Counsel submitted that it was upon the court to determine whether the suit was one where more than one person had an interest then make an order that whoever has an interest in the suit ought to be served or notified.

6. The trial magistrate came to the conclusion that the Plaintiff had no locus standi to sue the defendant as Ramasha Farmers' Cooperative Society Limited is body corporate capable of suing and being sued in its name. He relied on section 12 of the Cooperative Societies Act which provides as follows:

“Section 12. Upon registration every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, **to sue and be sued** and to do all things necessary for the purpose of, or in accordance with its by-laws”.

7. The Cooperative Societies Act is gives the power to a Cooperative Society to sue and be sued in its own name. In my view, the chairman would only have obtained the authority to swear the verifying affidavit on behalf of the Cooperative Society in accordance with order 4 Rule 1(4) which provides as follows:

“Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

8. In the instant suit, the plaint was filed in the name of the Plaintiff in his capacity as the Chairman of Ramasha Farmers' Cooperative Society Limited. In view of the provisions of section 12 of the Cooperative Societies Act, there was really no need for the Plaintiff to sue in his name as the capacity to sue is vested in the Society itself. With respect, I do not agree with counsel for the Appellant that this is a suit where any of the members could have sued in his own name as a person having an interest in the proceedings. In my view, the provisions of Order 1 Rule and 2 of the Civil Procedure Rules apply in circumstances where the persons interested in the suit are not members of a body corporate. Although I do not agree with the trial magistrate that the plaintiff could have sued if he had obtained the authority of all the members, her conclusion that the plaintiff had no locus standi is still valid.

#### **Whether the trial magistrate arrived at the wrong decision**

9. Having arrived at the finding that the learned trial magistrate was right in holding that the plaintiff had no locus and noting that this is the basis upon which her decision was based, I am unable to see how she could have been wrong in her decision. Granted that she went on to give a scenario where the court might have ruled differently on the issue of locus, she still came to the conclusion that she would have dismissed the suit as the plaintiff had failed to prove the case on a balance or probabilities. This does not mean that she actually based her decision on the evidence adduced by the parties. I therefore uphold the decision of the lower court that the plaintiff had no locus standi.

10. The upshot is that I find no merit in the appeal and I dismiss it with costs to the Respondent.

**Dated, signed and delivered at Kisii this 31<sup>st</sup> day January 2020**

**J.M ONYANGO**

**JUDGE**