



**REPUBLIC OF KENYA**  
**IN THE E & L COURT AT BUSIA**  
**CIVIL CASE NO 180 OF 2017**

**EVERLYNE AMINA WESONGA & 2 OTHERS.....PLAINTIFFS**

**= VERSUS =**

**PANCRUS GILVERS OPATA & 6 OTHERS.....DEFENDANTS**

**R U L I N G**

1. The Defendants have moved the court under the provisions of section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act; Order 8 of the Civil Procedure Rules and article 159 of the Constitution vide their application dated 27<sup>th</sup> August 2019. The applicants are seeking to be granted these orders;

**a) THAT the plaint herein be struck out and the suit be dismissed with costs for being an abuse of the Court process.**

**b) Costs be provided for.**

2. The application is supported by the following grounds;

*i) The suit was filed without the requisite witness statements and or list of exhibits as is required by law.*

*ii) The suit was filed without any written authority to sue on behalf of the alleged minors.*

*iii) The suit is incompetent and an abuse of the Court process.*

3. The application is further supported by the affidavit of Mr. Francis Omondi, counsel appearing for the applicants herein. He deposed that Everline Wesonga the 1st plaintiff was required to sign a written authority for her name to be used in the suit. He states further that the plaintiff was required to file alongside the plaint a list of witnesses to be called during the trial and copies of documents to be relied upon. The applicants confirmed through the Deputy Registrar of the Court that these documents were indeed not filed which is a contravention of the mandatory procedures.

4. The Plaintiffs opposed the application by filing a replying affidavit sworn by Everline Wesonga on 27<sup>th</sup> Sept 2019. Ms Wesonga deposed that the application is premature and made in haste as her application to amend the plaint filed prior to this is pending for determination. She deposed that the minor plaintiffs lack capacity to give her consent. The Respondents concede that the witnesses statements and documents were not filed alongside the plaint but added that such omission is not fatal.

5. The Respondent deposed that this being a land matter, it ought to be disposed on merit and not on

technicalities. That she co-owns the suit land with her children who are the minors in this suit as shown in a copy of the title annexed as EAW2. She urged the Court to dismiss the application dated 27th Aug 2019 with costs.

6. The applicants reiterated the facts pleaded that the suit was filed without signed authority and that the list of witnesses and documents were not filed. Similarly, the Respondents submitted that the application raises issues of technicalities and invoked the provisions of Article 159 of the Constitution to be applied. That any of the plaintiffs who are co-owners can agitate their rights either singularly or severally. Mr Ashioya learned counsel for the Respondents added that the list of witnesses and list of documents have now been filed and the same does not prejudice the defendants in any way.

7. I have considered the pleadings filed and the submissions rendered. The plaintiff pleaded in paragraph 1 of the plaint that she brought the suit on her own behalf and on behalf of her minor children. The entire suit cannot be struck out for lack of written authority because the 1st plaintiff did not need her own authority to bring the suit. Secondly the Applicants have not pleaded nor submitted that the plaintiffs claim can be severed given that they co-own the suit property. Consequently, it is my finding that although the written authority was necessary, its omission is not fatal to his case on account that the 1st plaintiff's suit can stand on its own.

8. The remaining issue is whether the suit should be struck out for non-filing of the list of witnesses and list of documents. The applicants submitted that order 3 & 4 requires documents to be filed alongside plaints and the failure thereof amounts to abuse of the Court process. Order 3 rule 2 provides thus;

“ \_\_\_\_\_ ”

9. Order 3 rule 2 makes provision for filing of the documents not filed alongside the plaint at least 15 days before the conference date with leave of the Court. This suit is not yet ready for pre-trial conference because there is a pending application by the Plaintiffs/Respondents to amend their plaint. Further just before the application proceeded to hearing, the Respondents filed the list of witnesses and list of documents to be used during the trial. In the case of *DT Dobie Kenya Ltd vs Muchina (1982) eKLR* the Court of Appeal held that a suit should be struck out if it is so hopeless that it cannot be cured even by amendment.

10. In the suit, the flaws raised in the application can easily be cured by amendment and or with leave of the court. It is thus my considered opinion and I so hold that the lack of authority and or non-filing of the documents referred to alongside the plaint was not fatal to a suit that is yet to be set down for pre-trial conference. The application for striking out was thus made prematurely and on this account I dismiss it with an order that each party meet their respective costs.

**Dated, signed and delivered at BUSIA this 15<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**