



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 21 OF 2017

ESTHER NELIMA MANYASI.....PLAINTIFF/RESPONDENT

VERSUS

SIMEA JAMIN ALFRED.....DEFENDANS/APPLICANT

ANUNDA DAVID.....DEFENDANS/APPLICANT

ALAMBE KHATERA.....DEFENDANS/APPLICANT

JAMES WAFULA.....DEFENDANS/APPLICANT

ANTONY MANASSE.....DEFENDANS/APPLICANT

ALBERT WAFULA MUSOMBI.....DEFENDANS/APPLICANT

PETER BARASA.....DEFENDANS/APPLICANT

RULING

The application is dated 13th March 2017 and is brought under section 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya and order 4 rule 1 (3) of the Civil Procedure Rules seeking the following orders;

1. The plaint dated 30th day of August, 2016 and filed in this honourable court on 30th January, 2017 be struck out.
2. The respondent do pay the costs of this application to the applicants.

The Applicants/ defendants submitted that, this is representative suit, whereby it is alleged that other plaintiffs are Zebedee China Manyasi, Ann Namavuli Manyasi, Emily Nyongesa Kisindayi and Betty Makonjo Manyasi as is shown in the annexed photocopy of the Title Deed No. North Kabras/Kivaywa/688. Annexure marked SJA 1. That the late Kisindayi Manyasi was selling the land parcel No. North Kabras/Kivaywa/688 on behalf of the five plaintiffs including Esther Nelima Manyasi who all shared the money. That the written authority given to the plaintiff by the other alleged plaintiff's to institute legal proceedings against me is bad in law in that it has no verifying affidavits from the said plaintiffs. That in view of the fact the plaintiff lacks proper authority to institute legal proceedings against me it is my humble request to this court to strike out the plaint filed in this court on 30th January, 2017 with costs to them. That Zebedee China Manyasi has been a witness to sale transactions involving Land Parcel No. North Kabras/Kivaywa/688 and cannot be a witness and plaintiff in this case at the same time.

The respondent/plaintiff submitted that, at the outset, the application is scandalous, frivolous and vexatious as the same cannot see the light of the day. That the land in question land parcel No. N. KABRAS/KIVAYWA/688 was initially registered in the name of Hezron Manyasi Kusimba now deceased. That she filed succession cause vide NRB P & A NO. 2858 of 2014 jointly with her sister Betty Makonjo Manyasi (annexed and marked ENMI is a copy of the grant). That after succession, the land was registered in the name of Zabeedee, China Manyasi, Ann Namakavuli Manyasi, Emily Nyongesa Kisindayi, Betty Makonjo Manyasi and herself (annexed and marked ENW2 is a copy of the title deed). That her father passed away on 27th January, 1980 (annexed and marked ENW3 is a copy of the death certificate). That the statements of the defendants herein on record speak for themselves to the effect that they purchased their respect pieces of land from one Kisindayi Manyasi (deceased) when her father had already passed away. That one cannot deal with the property of the deceased when he has no authority (an administrator). That it is then trite law that her late brother Kisindayi Manyasi had no capacity to deal with the land in question, hence all the agreements entered in with the defendants which are denied stand to be null and void abnatio. That the defendants are illegally in occupation of land parcel No. N. KABRAS/KIVAYWA/688 and that is why she consulted her co-registered owners to institute

the eviction and demolition proceedings against the defendants. That her co-registered owners who are her sisters and her brother gave her authority to file this suit (annexed and marked ENM4 is a copy of the authority letter). That the said authority letter is part of the pleadings on record. That the law allows her to institute the present case for and on behalf of her co-registered owners as envisaged under order 1 rule 8 (1), of the Civil Procedure Rules Cap 21 Laws of Kenya which reads:-

“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 or as presenting all except one or more of them.”

That she did not initiate this case without the knowledge of her co-registered owners. That the defendants are keen to delay this case with the present application as they are occupying their land without authority. That rules of natural justice are that a party should not be condemned un-heard neither should a case be decided on technicality against the letter and spirit of Article 159 (2) (d) of the Constitution 2010. That be it as it may, the present application is fatally defective as the signature appended by the commissioner for oaths purported to have been signed by Advocate Were on the affidavit is total forgery and notice is hereby issued to one Mr. David Lazarus Were Advocate to attend court to that effect.

This court has carefully considered both the applicants’ and the respondent’s submissions herein. The application is based on the annexed affidavits of Simea Jamin Alfred, Anunda David, Alembe Khatera, James Wafula, Anthony Manasseh, Albert Wafula Musombi and Peter Barasa. The applicants submit that in the absence of verifying affidavits filed in court from other alleged plaintiffs the written authority filed in court cannot be relied on by the court. The plaint has not fulfilled the requirements of a representative suit. The respondent did not obtain proper authority from the other alleged plaintiff’s to institute legal proceedings against the applicants herein.

It is not in dispute that, the land in question land parcel No. N. KABRAS/KIVAYWA/688 was initially registered in the name of Hezron Manyasi Kusimba now deceased. That she filed succession cause vide NRB P & A NO. 2858 of 2014 jointly with her sister Betty Makonjo Manyasi (annexed and marked ENMI is a copy of the grant). That after succession, the land was registered in the name of Zabedee, China Manyasi, Ann Namakavuli Manyasi, Emily Nyongesa Kisindayi, Betty Makonjo Manyasi and herself (annexed and marked ENW2 is a copy of the title deed). That her father passed away on 27th January, 1980 (annexed and marked ENW3 is a copy of the death certificate).

Order 1 Rule 8 of the CPR provides as follows:

“ (1) 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 or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”

Rule 8 above is stated in mandatory terms that notice of the suit must be given to all persons on whose behalf or for whose benefit a suit is instituted or defended, and such notice shall be given either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

In the case of **GEORGE OLESANGUI & 10 others v KEDONG RANCH LIMITED (2010) eKLR** the court held as follows;

“This rule in my humble opinion requires that once a notice had been given in terms of rule 8(2) Order I, any further proceedings by the representative plaintiffs must have the authority in writing of those others on whose behalf the suit was commenced. In my view further, and in relation to this matter, it is the process the Plaintiffs ought to have been advancing by the Chamber Summons of 18th December 2009. They did not need leave of court to file the representative suit.”

Again the said Judge observes in **Voi Jua Kali Association vs. Sange & Others [2002] 2 KLR 474**,

"Ideally, it would have been proper and fair to parties and particularly to those parties interested in the suit if permission of the court was obtained before any of them sues on their behalf for some of them may very well not accept to be represented or even to have the Plaintiff filing a claim in their name for various reasons. However fair or unfair, the provisions of Order 1 rule 8 do not require the Plaintiff to obtain leave of the court to sue on behalf of their intended parties. All that the rule requires is to give notice to those interested parties of the existence of the suit to enable those of them who want to, comply with Order 1 rule 8 (3) i.e. apply to court to be made a party in such suit."

I find that indeed the land in question is registered in the name of the plaintiff together with Zabedee, China Manyasi, Ann Namakavuli Manyasi, Emily Nyongesa Kisindayi, Betty Makonjo Manyasi (annexed and marked ENW2 is a copy of the title deed). These are interested parties and I find that provisions of Order 1 rule 8 do not require the Plaintiff to obtain leave of the court to sue on behalf of their intended parties. All that the rule requires is to give notice to those interested parties of the existence of the suit to enable those of them who want to, comply with Order 1 rule 8 (3) i.e. apply to court to be made a party in such suit. I find this application is not merited however I order that the plaintiff/respondent notifies the said parties (through personal service) mentioned above as co-owners of the existence of this suit within the next 14 days of today’s date. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE