



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 105 OF 2012**

**ITHENGURI MWIRERI WOMEN GROUP**

**(SUING THRO'**

**ESTHER WANJIRU MUCHEMI**

**PHILOMENA WANGU NJOROGE**

**MARY NYAMATHIRA KIBUI.....APPELLANTS**

**VERSUS**

**VIRGINIA WANJIKU KAMUNDIA.....RESPONDENT**

**JUDGMENT**

**(Appeal against the ruling and order of Hon. E.K.Makori delivered on 12<sup>th</sup> September, 2012 in Nyeri CMCC 324 of 2005)**

**FACTS**

1. The Appellants belong to **ITHENGURI WOMEN'S GROUP** a self-help group and the Respondent was a former member and a former Chairlady of the group; the appellants instituted legal proceedings in the subordinate court against the respondent for the recovery of monies taken by the respondent from the group allegedly without authority; at the time of filing the representative suit the appellants failed to file the document giving them the authority to act on behalf of the group; neither was the authority filed as a discovery document in the List of Documents; at the hearing of the main suit Philomena Wangui Njoroge (**PW1**) attempted to produce the authority to sue as an exhibit in evidence but the respondent raised a Preliminary Objection to its admittance; and the objection was upheld by the trial court;

2. Being aggrieved by the decision of the trial court the appellants filed a Memorandum of Appeal dated the 19<sup>th</sup> September, 2012 and listed two (2) grounds of appeal to wit;

(i) The ruling on the objection to the admission of evidence was clearly against the law and is bound to engender miscarriage of justice where the appellant is denied an opportunity to adduce evidence which is clearly admissible under the Evidence Act;

(ii) The exclusion of the evidence was erroneous and not supported by law.

3. The appeal raised pure points of law and both counsel agreed to dispose of the appeal by way of written

submissions which were filed and exchanged; the Appellant was represented by **Mr. Karuweru**, learned counsel whereas the Respondent was represented by **Mr. Khalwale** learned counsel hereunder is a summary of the parties rival submissions.

### **APPELLANT'S SUBMISSIONS**

4. (i) The appeal is an interlocutory appeal on the admissibility of evidence; that a court cannot prevent a litigant from adducing evidence where the evidence is a relevant document; the document relates to authority to sue;

(i) The Plaintiff/appellant is a self-help group suing through its officials in their names; in the Plaintiff and the Verifying affidavit the Plaintiff describes herself as:

**“The Vice Chair of the plaintiff group and duly authorized to file the Plaintiff”**

(ii) The authority is challenged in the defence at paragraph 2; and a Preliminary Objection was raised that the authority to sue was not admissible; the question the court ought to determine is whether the document is relevant; if it is found to be relevant then it is admissible; and the document can be produced by the maker in its original form;

(iii) The suit being a representative suit and that the document must be filed in the case as provided by Order 1 Rule 13; Counsel for Respondent states that it ought to have been filed with the Plaintiff; trial court opined that if it had been filed as a discovery document then there was no need to produce it as it would be already in the file;

(iv) That the pitfall is that if the document is put in the court record then a party does not need to produce it as an exhibit; this is a misdirection on what constitutes discovery; is it production or is it admitted into evidence; that mere filing of documents not enough; the documents ought to be owned on oath by the litigants to allow for cross-examination; if the authority is challenged then it is an issue for determination; to prevent it from being put in is a fatal misdirection and completely prejudicial to the Plaintiff; there was need for the Plaintiff to show court his/her principals authority to appear;

(v) Counsel referred to Article 159 of the Constitution and submitted that courts are minded to allow litigants to put forth their best case in the best way they know; and must do substantive justice; no evidence should be locked out;

(vi) Counsel prayed that the appeal be allowed; the production of the document do ensue; and the matter proceed before the trial court.

### **RESPONDENT'S SUBMISSIONS**

5. (i) The appellants did not file the authority to act on behalf of the group at the time of filing the case; neither was it filed as a document in the case;

(i) That the appellants attempted to introduce it as an exhibit at the hearing of the suit; that the trial court upheld the objection raised by the respondent;

(ii) Order 1 Rule 13(1)(2) of the Civil procedure Rules behoves a litigant who represents others to file an authority in the case; that such authority ought to be filed with the pleadings and cannot be part of the exhibits to be produced;

(iii) The intention of the legislature was that the authority be filed at the time of filing of the suit;

(iv) The authority was neither filed with the Plaintiff nor filed as a document in the case; in the circumstances the trial court was right in rejecting its introduction at the hearing stage;

(v) Reference was made to the case **Peters vs Sunday Post Limited [1958] EA 424** where it was held that;

**“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution, if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong the appellate court will not hesitate so to decide”**

(vi) Counsel submitted that failure to file the authority document at the time of filing the case was fatal; that the law was very clear that such authorities should be filed together with the Plaintiff which the applicant failed to do; and urged the court to disallow the appeal with costs to the respondent.

### **ISSUES FOR DETERMINATION**

6. After reading the written submissions of the respective parties this court has only framed one issue for determination;

(i) Whether to interfere with the decision of the trial court;

### **ANALYSIS**

7. This being the first appellate court it behoves this court to reconsider the evidence on record, re-evaluate it and to arrive at its own independent finding and conclusion.

8. It is not disputed that at the time the suit was instituted the authority to sue was not filed with the Plaintiff; that at the time of discovery the authority to sue was not included in the List of Documents; that it was at the hearing stage that an attempt was made to introduce the document and this was objected to by the respondent which objection was upheld by the trial court; and it is this decision that has evoked this appeal;

9. The general rule is when exercising this discretion the court must act judiciously and not arbitrarily; and that there must exist material upon which the discretion can be exercised upon; in this instance the discretion could have been exercised either on procedure or upon scrutiny of the document to determine its competence, relevance and admissibility; the trial court chose to exercise its discretion on procedure;

10. It is also trite law that when a trial court exercises its discretion that an appellate court should not interfere with the exercise of the discretion of a trial court unless it is satisfied that the decision is clearly wrong or because it has misdirected itself or because it acted on matters on which it ought not to have taken into consideration or failed to take into consideration matters it ought to have taken into consideration and in so doing arrived at a wrong conclusion;

(vii) Counsel for the applicant raised the issue for determination was whether the document is relevant; if it is found to be relevant then it is admissible; and the document can be produced by the maker in its original form; this court will scrutinize the document to determine its relevance and its admissibility;

11. Upon perusal of the Plaintiff it is noted that the Plaintiff described itself therein as a self-help group; which in law is a recognized legal entity which has powers to sue and can also be sued; it is a legal requirement that a suit by such an entity be instituted through its office bearers; the Plaintiff it is noted does not however disclose the positions held by the three individuals named therein; The Verifying Affidavit it is further noted is singular in nature and is made by only one of the individuals and who describes herself therein as the Vice Chair; the other two officials it is also noted have no affidavit(s) filed verifying the contents of the Plaintiff or their positions;

12. The law requires that in a suit of this nature that there be an authority to sue to legitimize the

pleadings; upon perusing the authority to sue which is a signed list made by the members this court notes that it does not disclose whether the three individuals bestowed with the authority to sue are the office bearers of the self-help group, there is no description of the positions they hold; neither is the document dated nor witnessed making this document incompetent and untenable in law; it therefore follows that the document is not what it purports to be thus making it irrelevant and inadmissible in law;

13. It is also this court's considered view that Order 1 Rule 13(1)(2) of the Civil Procedure Rules provides for the rules that ought to be followed; in that a litigant who represents others shall file an authority in the case; the operative word is "**shall**" that such authority must be filed with the pleadings; and not produced as an exhibit as in this instance;

14. The law provides that the document ought to have been filed within the case; and good practice dictates the filing of the authority together with the Plaint at the time of filing the plaint; at the very latest it ought to be filed at the discovery stage giving the opponent time to inspect it as to its admissibility and enable in the preparation of the defence; after discovery and closure of pleadings any introduction of any documents at the hearing stage can only be done with the express consent of the opponent or at the discretion of the trial court;

### **FINDINGS AND DETERMINATION**

15. For the forgoing reasons this court associates itself with the decision of the trial court on procedure and finds that there was non-compliance with the provisions of the law; the document is also found to be irrelevant as it does not support the pleadings and is therefore inadmissible;

16. This court is satisfied that the trial court exercised its discretion properly and finds no reason to interfere with its decision as it was clearly based on the correct provisions of the law and that the trial court did not misdirect itself; and did not arrive at a wrong conclusion;

17. The appeal is found lacking in merit and is hereby disallowed.

18. The Respondent shall have costs of this appeal.

19. The suit is referred back to the subordinate court for hearing and determination.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 9th day of February, 2017.**

**HON.A. MSHILA**

**JUDGE**