



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 284 OF 2014

PETER OMANI OBIRIA PLAINTIFF

VERSUS

HUDSON OKEMWA 1ST DEFENDANT

JOHN NYAGERI 2ND DEFENDANT

REGISTERED TRUSTEES

AGRICULTURAL SOCIETY OF KENYA 3RD DEFENDANT

SAMWEL MOMANYI ONSANSE – THE CHAIRMAN

GUSII MWALIMU ACHWA ASSOCIATION 4TH DEFENDANT

RULING

1. By a plaint (amended) dated 23rd February 2015 the plaintiff claims to be the registered proprietor of the leasehold interest over **land parcel Kisii Municipality/Block II/253**. The plaintiff claims the 1st, 2nd and 4th defendants are in unlawful occupation of the subject parcel of land and that upon making demand to them to vacate the portions they occupy the plaintiff avers that the 3rd defendant responded to the claim and denied the 1st, 2nd and 4th defendants are in trespass of the plaintiff's land and instead asserted that the portion in occupation by the 1st, 2nd and 4th defendants forms part of the 3rd defendant's land. The plaintiff inter alia seeks judgment against the defendants jointly and severally for:-

“A declaration that the portion of land under occupation, possession and use of the 1st, 2nd and 4th defendants and claimed by the 3rd defendant as its land legally and lawfully forms part of the leasehold interest Kisii Municipality/block II/253 registered in the names of the plaintiff.”

The 3rd defendant, Agricultural Society of Kenya (ASK) filed a Memorandum of Appearance dated 12th August 2014 under protest and a statement of defence dated 2nd September 2014. Under paragraph 3 of the Statement of Defence the 3rd defendant states thus:-

3. The defendant denies its description under paragraph 3 of the plaint and hereby gives notice that it will at the appropriate time raise a preliminary objection for determination in limine.

2. The 3rd defendant on 7th May 2015 filed a notice of intention to raise a preliminary objection seeking to have the suit against it struck out on the following grounds:-

(i) That the entire suit herein is not maintainable in law as against the 3rd defendant in the manner canvassed and the orders sought are not available to the plaintiff in law.

(ii) That this suit is an abuse of the process of this honourable court and cannot be ventilated or heard by this court for that purpose.

(iii) That the plaintiff's suit is fatally defective and neither maintainable in law nor can it be ventilated before court.

The court on 6th October 2015 directed that the preliminary objection be argued by way of written submissions. The 3rd defendant's submissions dated 20th November 2015 were filed on 23rd November 2015 and the plaintiff's response submissions dated 5th February 2016 were filed on 10th February 2016.

3. The 3rd defendant in its submissions takes the position that registered societies cannot sue in their own names. The 3rd defendant referred the court to the case of **John Othenyo Amwayi & 2 others –vs- Rev. George Abura & 2 Others (Civil Appeal No. 6339 of 1990)** where **Bosire, J.** (as he then was) stated thus:-

“The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names.”

4. In the case of **James Gitonga –vs- Trustees of the Agricultural Society of Kenya [2010] KLR** a claimant had his pleadings struck out as he had failed to individually name the trustees of the society and the court held that

“The claim before the court is incompetent as the respondent herein is not a legal person or a corporate body. This is a matter the court cannot overlook.”

Other cases where the courts have held societies cannot be sued or sue in the own names include **African Orthodox Church of Kenya –vs- Charles Omuroka & Another [2014] eKLR** where Mwita J. held that a religious organization registered under the Societies Act cannot sue or be sued its name; **Grace Mwenda Munjuri –vs- Trustees of the Agricultural Society of Kenya [2014] eKLR** and **Margaret Muthoni Kanyuku –vs- Glory Ministry Church & 2 Others [2012] eKLR** in the latter case **Ougo J.** in striking out the suit held that Glory Ministries Church having been registered as a society could only be sued in the names of the registered trustees and/or officials. The judge referred to Halsbury's Laws of England, 3rd Edition Volume 18 paragraph 239 which states as follows to fortify her holding:-

“The trustees of a registered society or branch or officers authorized by its rules may bring or defend actions of legal proceedings with respect to any property, right, or claim of the society or branch and may sue and be sued in their proper names without other description than the title of their office.”

The 3rd defendant thus submitted that it being a registered society it cannot be sued in its name and/or through its unnamed trustees and on that account urges the court to find the suit against it as defective and incompetent and to strike the suit as against the 3rd defendant out.

5. The plaintiff on his part submits that the court should administer justice without undue regard to procedural technicalities and places reliance on Article 159 (2) (d) of the Constitution. Further the plaintiff cites the provision of order 1 Rule 9 of the **Civil Procedure Rules** which provides that no suit

ought to be defeated by reason of misjoinder and or non joinder of parties and urges the court to invoke the provisions of Order 1 Rule 10 (2) which allows a party to be enjoined to a suit at any stage of the proceedings or to be added.

6. I have reviewed the pleadings in this matter and it is clear that the dispute herein is principally between the plaintiff and the 3rd defendant. The 1st, 2nd and 4th defendant's claim arises through the 3rd defendant who it is alleged is their landlord. The 3rd defendant claims ownership of the suit property. While I agree the 3rd defendant is not appropriately sued, I nonetheless consider that the 3rd defendant when properly sued would be a vital party to the proceedings if the dispute is to be **“effectually and completely adjudicate upon and all questions involved in the suit settled.”**

7. Therefore, although the 3rd defendant has laid a basis to have the suit against it struck out on account of lack of capacity, I do not consider striking out the suit against the 3rd defendant will serve the ends of justice. Sections 1A and 1B of the Civil Procedure Act enjoins the court to have cognizance of the overriding objective fo the Act which is to render justice substantively and in an expedient manner and in a cost effective manner to the parties. Striking out the suit as I am urged by the 3rd defendant in my view would not be in facilitation of the overriding objective. The 3rd defendant in my view is a necessary party in these proceedings and the ends of justice demand that the 3rd defendant do appropriately become a party. I will accordingly grant liberty to the plaintiff to within the next 21 days from the date of this ruling to replace the 3rd defendant as presently constituted with the proper 3rd defendant, giving the names of the Trustees/officials to represent the **“Agricultural Society of Kenya”** as the 3rd defendant in the suit failing which the suit as against the 3rd defendant will stand struck out on account of being defective. The 3rd defendant is awarded costs of kshs. 5,000/= for the application to also be paid within 21 days of the date hereof.

8. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 8th day of April, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the 1st defendant

..... for the 2nd defendant

..... for the 3rd defendant

..... for the 4th defendant

J. M. MUTUNGI

JUDGE