



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CIVIL SUIT NO. 232 OF 2014 (OS)

KATANA SAID KALAMA & OTHERS.....PLAINTIFFS

-VERSUS-

TWO THIRDS INVESTMENT LIMITED.....DEFENDANT

RULING

1. The applicants moved the Court under Order 1 rule 8 and 10 (2) Order 51 rule 1 of the Rules and section 1A, 1B, 3A and 63 of the Act. They seek the following ;
 1. **That all further or any proceedings in this suit be stayed pending the hearing and determination of this application.**
 2. **That the Applicants be granted leave to be enjoined onto this suit and be considered and/or treated as Plaintiffs No. 2 to 41 and be allowed to participate in this proceedings as such.**
 3. **That upon the grant of prayer 2, above, the original Plaintiff herein, being Katana Said Kalama be ordered to amend his originating summons dated 10th September, 2014 and any other relevant pleadings to reflect the sought for amendments herein and effect service on the Applicants as per the law.**
 4. **That the Honourable Court do give any further directions in the matter as the Court may deem necessary.**
 5. **That costs of this application be provided for.**
2. The motion is supported by the 3 grounds on the face of it and the affidavit of Ali Juma Mwakaneno. The applicants aver that they have a similar cause of action as the plaintiff and no prejudice will be suffered by the defendants if they are joined.
3. The plaintiff has no objection to the application being joined. The Defendant has opposed the application. She filed grounds of opposition that the application seeks to rectify the offence against the mandatory provisions of Order 1 rule 13 of the Civil Procedure Rules through the back door.
4. Parties have filed written submissions which I have had an opportunity of reading and considering while writing this ruling. The Defendant submit that the plaintiff lacked locus to institute a representative such as it was filed without authority as required in law as provided under Order 1 rule 13 provides thus ;

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

5. The applicant on their part states they are not seeking to rectify the anomaly as claimed by the defendant but have brought this motion as of right. The originating summons as filed read thus in regard to the parties ;

APPLICATION BY :

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6. The names of the others were not disclosed. The applicants have moved the Court on their own. They claim that they have been living on the land and are therefore entitled to it by way of adverse possession. Consequently they have a similar cause of action. The fact that they may be included in the “*others*” referred to in the originating summons does not invalidate the suit as before the disclosure was made then there was no one to give the plaintiff to file the suit.
7. The Applicants have submitted and I entirely agree with that submission that they could have chosen to file separate suits against the Defendant which action would unnecessarily cause multiplicity of suits. In any event in determining the issue of curing a defect through the back door as raised by the defendant, the Court in **D. T Dobie & Co (K) Ltd vs Muchina (1982) KLRI at holding No 9** said this

“The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.

8. In this instance if the result of the application is to rectify defect then there is nothing wrong with it. However it is my finding that there is nothing wrong with the Applicants being joined into this suit if the cause of action is the same as the Plaintiff's. The Defendant has not denied this fact. In the end, I find merit in the motion dated 10.4.2015 and allow it in terms of prayer 2 and 3. Costs are not awarded.

Ruling dated and delivered at Mombasa this 11th day of May 2016

A. OMOLLO

JUDGE