



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL APPEAL NO. 200 OF 2009**  
**SCHOLAR MUNYITHYA KULU.....APPELLANT**  
**VERSUS**  
**SYONDO MATHUNYANI WOMEN SELF HELP GROUP.....RESPONDENT**

*(Being an appeal against Judgment of the Principal Magistrate's*

*Court at Kitui by Hon. T.M. Mwangi (RM)) in*

*Civil Suit No. 166 of 2002 dated 21<sup>st</sup> October, 2009)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. By a judgment dated 21<sup>st</sup> October, 2009, the trial court herein granted judgment to the Respondent herein in the sum of Kshs. 28,977/= plus costs having found after the trial that the appellant owed the above sums to the Respondent and that the appellant had promised to pay the money.
2. Being not satisfied with that judgment the appellant has filed this appeal, and vide an amended Memorandum of Appeal filed on 12<sup>th</sup> November, 2015, has preferred seven (7) grounds of appeal set out therein.
3. The appellant also filed submissions to the appeal on 21<sup>st</sup> July 2016 while the Respondent did not do that despite notice to do so.
4. I have considered the grounds of appeal. The main ground revolves on the allegation that the Respondent was not a legal person and so the suit was a nullity *ab initio*. The defence had raised a preliminary objection stating that the plaintiff was not a legal entity and therefore lacked the *locus standi* to file and maintain the suit. In ruling on that issue the honourable learned magistrate rendered himself as follows:

*“This is a ruling on the preliminary objection raised by the defendant. When this matter came up for hearing on 5<sup>th</sup> August, 2004 the advocate for the defendant raised a preliminary point of objection namely, that the plaintiff did not have any legal existence in law and could therefore not sue nor be used. This argument was that the registration of the plaintiff under the ministry of culture and social services did not confer to it any rights and/or liabilities enforceable at law. He*

also argued that for the plaintiff to have legal existence, it had to be registered under an Act of parliament which was not the case herein.

The advocate for the plaintiff on the other hand contended that the plaintiff is a women group registered under the ministry of culture and social services and that the description of the plaintiff in the pleadings “society registered” is meant to show that the plaintiff is a formation of a group of people. He argued further that in instituting the suit they did not specifically give the name of the chairlady because the post is an elective one.

I have considered the respective arguments of both counsels and find that even though the plaintiff is not registered under an Act of parliament it nonetheless has capacity to either sue or be sued. In arriving at this finding, I have been guided by the provisions of order I rule 8(1) of the Civil Procedure Rules which provides thus:-

“Where there are numerous persons having the same interest in one suit, one or more such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.”

The description of the plaintiff in the pleadings as “Syondo Mathuunyani women group” clearly shows that the plaintiff is composed of numerous persons having the same interest. Indeed I am in agreement with the submission of counsel for the plaintiff when he said that it was unnecessary to give specific names of the chairlady as the post was elective. In my view, the chairlady would be acting on behalf of the group.

Consequently, I am satisfied that the suit before me is a representative one and its institution through the chairlady is proper. In the case **Hinga and Another –vs P.C.E.A through Dr. Njoya and Another (1986) KLR 317** at page 326, the court said:-

“I would also like to add that if such a representative action was brought in this case, as should have been, the office bearers... are the ones that should have been named...”

For reasons I have stated above, it was unnecessary to give specific names of the chairlady. Be that as it may the preliminary objection raised in this matter is a technical or procedural point which is curable under order 1 rule 7 of the Civil Procedure rules which provides as follows:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before court.”

Having found therefore, that the suit is properly brought before the court, the preliminary point of objection fails. Consequently, I order that the suit be heard and concluded on its merits. The preliminary point of objection is, therefore, dismissed with costs.

Order accordingly.”

5. This appeal hinges mainly on the allegation that the Respondent did not have legal capacity. It is true that being a women group the Respondent was not registered under an Act of Parliament. However, that did not mean that the group did not exist. I am satisfied with the finding of the learned magistrate that the group existed enough to sustain the suit. A court of law is a court of justice. It will not allow a party to benefit from its own unlawful conduct. Women groupings in Kenya is now a well founded phenomenon. Through these entitles women have invested billions of shillings and have received incomes which have paid school fees to children and sustained family units. The appellant was herself a member of that group and she admitted as such. She cannot now turn around and disown the group. Needless to add, the group did not have legal registration. However, a court of law will not be blinded to allow a party to misuse that fact. In this new era of the new Constitution, access to court and to justice is guaranteed under **Article 50**

to all parties.

6. Further, the new Companies Act now makes it easy for any party to access justice without resort to technicalities of registration, and indeed **Article 159(2)** of the **Constitution** requires courts to administer real justice without recourse to technicalities of procedure.

7. I am cognizant that the matter herein was filed in court before the new constitution was enacted. However, this appeal is being considered under the new Constitution and the Respondent is entitled to benefit in the spirit and expectation of the new Constitution. That aside, the ruling of the Honorable Magistrate that provisions of **Order 1 rules 7 and 8** of the **Civil Procedure Code** applied was a generous attempt to uphold justice for a helpless group at rural women who would otherwise suffer injustice due to a legal technicality.

8. I have also considered the remaining grounds of the appeal. I do not consider them relevant enough to affect the course of this judgment.

9. In the upshot the appeal here lacks merit and is dismissed with costs to the Respondent.

**THAT** is the judgment of the court.

**DATED, SIGNED AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2016**

**E.K.O. OGOLA**

**JUDGE**

**In the presence of;**

Mr. Mutia holding brief for Masika for Appellant

Court assistant – Mr. Munyao