



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

**ELC CASE NO. 822 OF 2013**

**ANDREW IRERI NJERU & 14 OTHERS .....PLAINTIFFS**

**VERSUS**

**THE HON. ATTORNEY GENERAL & 2 OTHERS .....DEFENDANTS**

**AND**

**MWANIKI MUNYI & 55 OTHERS ..... INTERESTED PARTIES**

**RULING**

By a plaint drawn and filed by the 1<sup>st</sup> Plaintiff herein namely ANDREW IRERI NJERU on 9<sup>th</sup> December 2013 acting on behalf of fourteen (14) other plaintiffs, several orders were sought against the Attorney General (1<sup>st</sup> defendant), the District Land Registrar Mbeere (2<sup>nd</sup> defendant) and an un-named Assistant Chief (3<sup>rd</sup> defendant) seeking the cancellation of land parcel No. MBETI/GACHURIRI/250 and 256 and for the name of MMUTOKAA/NTHAUTHO (2<sup>nd</sup> plaintiff) to be restored in the register. An order was also sought that the registration of land parcel No. MBETI/GACHURIRI/255 in the names of one EUNICE NYAGUTHII KARANI be cancelled.

The plaint also named fifty seven (57) interested parties as having benefited from the said sub-division of parcel No. MBETI/GACHURIRI/250.

On 15<sup>th</sup> January 2014 the 1<sup>st</sup> plaintiff field an application under certificate dated 7<sup>th</sup> January 2014 seeking a prohibitory order with respect to land parcel No. MBETI/GACHURIRI/255 and 256. However, that application was withdrawn by the 1<sup>st</sup> plaintiff before Ombwayo J. on 13<sup>th</sup> March 2014.

The 1<sup>st</sup> plaintiff then filed a Notice of Motion on 5<sup>th</sup> March 2014 seeking leave to enter interlocutory judgment against the defendants and the interested parties. That application was duly served upon both the advocate for the said interested parties Mr. Mungai as well as the State Law Office. Meanwhile, both the Attorney General and Mr. Mungai advocate filed notices of Preliminary Objections to the suit.

When the said application came up for hearing on 23<sup>rd</sup> June 2014 there was no appearance by the 1<sup>st</sup> plaintiff or any of the other plaintiffs. However, the 12<sup>th</sup> plaintiff who is an advocate of this court and who was in court for other cases informed the Court that he had neither been consulted about this suit nor had he given the 1<sup>st</sup> plaintiff any instructions to file the same on his behalf.

There was a letter dated 16<sup>th</sup> June 2014 written by the plaintiff and filed in court on 23<sup>rd</sup> June 2014 addressed to The President and the Chief Justice raising several issues. I shall revert to this letter later on

in this ruling.

As indicated above, when the plaintiffs' application came up for hearing on 23<sup>rd</sup> June 2014, none of the plaintiffs was present except the 12<sup>th</sup> plaintiff who said he had not given any instruction to the 1<sup>st</sup> plaintiff to file this suit. The court record also indicate that on 20<sup>th</sup> March 2014, the following four persons named as plaintiffs had filed affidavits to the effect that although they have been named as plaintiffs No. 4, 5, 7 and 11, they had not authorized the 1<sup>st</sup> plaintiff to file any pleadings on their behalf and neither did they know him. They asked that their names be expunged from the record. These four are:-

1. DANSON NJIRU MUBUNJIA – I.D NO. [particulars withheld]
2. MUNG'ORI NDII
3. STEPHEN NJIRU KARUGA
4. MUGO MWANIKI - I.D NO. [particulars withheld]

The Court allowed Mr. Mungai advocate for the interested parties and Mr. Menge from the Attorney General's office to raise their Preliminary Objections to the suit.

The gist of the Preliminary Objections raised by the interested parties and the defendants is that the plaint is defective and an abuse of the Court process as the said interested parties have not been properly enjoined in this suit. Further, it was submitted that though this is meant to be a representative suit, there is no evidence to show that the other plaintiffs have authorized the 1<sup>st</sup> plaintiff to file this suit on their behalf and infact the said plaintiffs are not even aware about this suit. Mr. Mungai urged me to find that this suit is too defective that it cannot even be cured by the overriding objective principle. He also urged me to award costs against the 1<sup>st</sup> plaintiff.

Mr. Menge similarly urged this Court to dismiss the suit with costs as the same is in contravention of the Government Proceedings Act as no notice was served upon the Attorney General's office and further, although the plaint is tailored as a representative suit, there is no authority from the other plaintiffs as was confirmed by the 12<sup>th</sup> plaintiff who was present in court. Further, there is no verifying affidavit signed by the 1<sup>st</sup> plaintiff. He too urged the Court to dismiss the suit with costs.

I have looked at the plaintiffs' pleadings herein and the Preliminary Objections raised by the defendants and the interested parties.

The starting point is whether the issues raised by the defendants and interested parties fall within the category of what may be considered to be Preliminary Objections. It is settled law that a Preliminary Objection raises pure points of law which are argued on the presumption that all the facts pleaded by the other side are correct – **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS 1969 E.A 969.** In my view, the issues raised by counsel for the defendants and interested parties are matters of law and are therefore properly raised as Preliminary Objections.

Looking at the plaintiffs pleadings, it is clear that this suit is meant to be a representative suit. There is a letter signed by fourteen (14) plaintiffs and dated 25<sup>th</sup> March 2013 authorizing the 1<sup>st</sup> plaintiff to file this suit on their behalf. Among them are DANSON NJIRU, MUNG'ORI NDII, STEPHEN NJIRU KARUGA and MUGO MWANIKI whom, as I have indicated above, have filed affidavits denying having given the 1<sup>st</sup> plaintiff any authority to file this suit. There is also the statement made by the 12<sup>th</sup> plaintiff, himself an advocate of this court, in which he said he had given no such authority to the 1<sup>st</sup> plaintiff to file this suit. Given those circumstances, and bearing in mind that an affidavit is a solemn declaration affirming the truth of its contents, the plaint herein must be treated with a lot of circumspection. The legitimacy of a representative suit flows from the authority that the individual parties to the suit have given whoever has filed the suit on their behalf. If there is no such authority or if the authority was obtained through fraudulent means, then the plaint or other pleadings can only be declared defective or incompetent. A plaintiff cannot be made to sue a defendant against his will. It follows therefore that the verifying affidavit sworn by MOTOKAA NTHAUTHO the (2<sup>nd</sup> plaintiff herein) in

which he had deponed, inter alia, that he is

**“---- authorized and hence competent to swear this verifying affidavit on behalf of 14 other plaintiff  
-----“**

cannot be true. This affects the veracity of the pleadings herein and in my view, amounts to an abuse of the Court process. This is not a case where there is no verifying affidavit or where the verifying affidavit has a genuine mistake that can be rectified. This is a case where the verifying affidavit is deliberately misleading. Such affidavit cannot in law satisfy the requirements of **Order 4(2) of the Civil Procedure Rules**. Such an affidavit and the pleadings that go with it can only be candidates for striking out. I would accordingly up-hold the Preliminary Objection as it is clearly questionable whether indeed there was any lawful authority granted to the 1<sup>st</sup> plaintiff to file this suit and whether there is a verifying affidavit in support of the suit as known in law.

The other Preliminary Objection relates to the joinder of the interested parties herein without their consent or knowledge. According to their counsel Mr. Mungai, the said interested parties have no nexus with this suit and are being forced to answer a claim that does not concern them. Again this Preliminary Objection is well founded. No application was filed to enjoin the said interested parties in these proceedings and according to their counsel, they have no interest in the matter. If a proper application had been made to enjoin the said interested parties in this suit, those issues would have been answered. As it is, all we have is the case of the said interested parties complaining that they have not been properly enjoined in this suit. The Court has no other evidence to the contrary and I must also uphold that Preliminary Objection that the interested parties have wrongly been enjoined in this suit. The same must therefore be struck out as an abuse of the Court process.

Before I leave this matter, when the case came up on 23<sup>rd</sup> June 2014, Mr. Mungai drew the Court's attention to a letter signed by the 1<sup>st</sup> plaintiff dated 16<sup>th</sup> June 2014 and filed in court on 23<sup>rd</sup> June 2014. In the said letter addressed to His Excellency the President of the Republic of Kenya and also the Hon. the Chief Justice, the 1<sup>st</sup> plaintiff is agitating for the establishment of an Environment and Land Court in Embu. Of course it would be ideal to have such a Court in Embu to handle the many land cases that are filed in this Court from Embu. Indeed, one of the pillars of the Judiciary is to promote access to and expeditious delivery of justice to the people of Kenya. This is to be achieved by ensuring proximity and physical access to the Court. Having written the said letter however, the 1<sup>st</sup> plaintiff then goes on to threaten that demonstrations will be held until the President appoints **“the 25 Judges ..... he kept in his achive (sic)”** and meanwhile, some litigants including the plaintiffs in this case will not attend the Environment and Land Court in Kerugoya. Of course that threat was kept and the plaintiffs did not attend the Court. But that is where the 1<sup>st</sup> plaintiff misses the point. Having filed this case in this Court on 9<sup>th</sup> December 2013 and served other parties putting them to expenses, it is a clear case of abuse of Court process to again turn around and refuse to attend Court to prosecute the suit. The Court can only conclude that this suit was filed with the ulterior motive of vexing the defendants and other parties. This Court will not countenance such conduct. Even as this Court recognizes the 1<sup>st</sup> plaintiff's right to push for the establishment of an Environment and Land Court that is easily accessible to the people of Embu and indeed to other persons in other counties, the 1<sup>st</sup> plaintiff must also be told that he cannot chose a forum to litigate his grievance and at the same time run away from the same forum.

Ultimately therefore and for the reasons given above, this suit is ordered struck out. The 1<sup>st</sup> plaintiff shall meet the costs thereof.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**10<sup>TH</sup> JULY, 2014**

**10/7/2014**

**Before**

**B.N. Olao – Judge**

**Mwangi – CC**

**Plaintiff – present**

**Attorney General for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant – absent**

**Ms Muthoni for Interested parties – present**

**COURT: Ruling delivered this 10<sup>th</sup> July 2014 in open Court.**

**Ms Muthoni holding brief for Mr. Mungai for the Interested parties present**

**Attorney General for Defendants absent**

**Plaintiff present**

**Right of appeal explained.**

**B.N. OLAO**

**JUDGE**

**10<sup>TH</sup> JULY, 2014**