



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

Civil Case 57 of 2006

EPHRAHIM MUGO NDWIGA & 3 OTHERS..... PLAINTIFFS

VERSUS

MUNENE NJAMA & 14 OTHERS..... DEFENDANTS

R U L I N G

This is the Notice of Preliminary Objection dated 29th March 2011, by the Defendants/Respondents herein.

M/s R.M. Mugo for the Defendants/Respondents have raised several issues asking the Court to dismiss the suit. The issues are as follows;

1. One Njiru Ndwiga had long predeceased the suit and so can't be made a party.
2. The purported 4th Plaintiff/Applicant Benson Njiru has disowned the suit.
3. The 1st Plaintiff/Applicant never sought the consent, approval and authority of the other Plaintiffs.
4. The 2nd and 6th Defendants/Respondents are deceased and there has been no substitution for over a year.

Mr. Njoroge has ostensibly relied on Order 3 rule 2 (a), Order 4, rule 1,2,3 and Order 24 rule 3 and 4 Civil Procedure Rules to argue his points.

In response to the Preliminary Objection Mr. I.C. Mugo who has since ceased acting for the Plaintiffs/Applicants filed a response. His main argument is that the suit (Originating Summons) herein was filed in the year 2006 when the Old Order XXXVI Civil Procedure Rules was self regulating and they complied with the Provisions. And therefore Order 3 and Order 4 Civil Procedure Rules are not applicable. And the new Order 37 rule 7 Civil Procedure Rules does not make provision for a verifying affidavit. He indicates that Njiru Ndwiga is not a party herein as he is deceased. The letter by 4th Applicant was a forgery and should not be relied on.

This suit commenced by way of Originating Summons filed on 26/6/2006. Order XXXVII rule (2) Civil Procedure Rules provided for the procedure which was followed. The law is that a dead person

cannot sue or be sued. He/she can only sue or be sued through a Legal representative. A look at the suit filed on 26/6/2006 reveals three sets of Plaintiffs/Applicants. There is a set which includes Njiru Ndwiga, while the 2nd Plaintiff is simply “Joseph Ileri” and another set shows the 2nd Plaintiff/Applicant as Joseph Ileri Njiru and a 3rd one shows the 2nd Applicant as Joseph Ileri Njiru Ndwiga. The Plaintiffs/Applicants have basically been shown as four (4) in number. If indeed NJIRU NDWIGA was one of them then the number would be five (5) which is not the case here. I therefore find that the indication of the name of NJIRU NDWIGA was an error on the part of the Plaintiffs/Applicants which ought to have been noted and corrected. Njiru Ndwiga is not and was not a party to the suit. In any event even if he was one of the Plaintiffs and the suit had been filed long after he had died its clear from the case of **HCCC NO.4/03 (KAK) LAWRENCE KWATSIMA –VS- TARIA MUTAKALE & ANOTHER** that the orders will only apply to the concerned party and not affect the others. In this case we have other Plaintiffs and so the suit would only be declared null and void as relates to the claim by the said Njiru Ndwiga.

The next issue is about the 4th Plaintiff/Applicant. Before me is a document (consent) dated 23/6/2006 which is signed by the 4th Plaintiff. Infact for his signature the name is just printed. I also have a letter written by the 4th Plaintiff dated 7/7/2006 in which he is disowning his consent to be made a party in this suit. This document has been signed by them.

Mr. I.C. Mugo states that the 4th Plaintiff never wrote the letter dated 7/7/2006, and that he was duped into signing it. He therefore confirms that the 4th Plaintiff signed it. A look at this signature and what he is purported to have signed on 23/6/2006 are glaringly different. The 4th Applicant has not sworn any affidavit deponing to the matter indicated by his former Counsel.

Mr. I.C. Mugo could not do so on his behalf. The Court therefore goes by the position as presented in the letter dated 7/7/2006. I therefore uphold the Preliminary Objection on the issue of the 4th Plaintiff. He has no interest in the matter and has no business remaining a party in the suit. His name is therefore struck out from the suit. And his claim against the Defendants is dismissed.

A copy of the authority to the 1st Plaintiff/Applicant dated 23/6/2006 was annexed to the response by Mr. I.C. Mugo. It shows that authority was obtained as required by Law. I have gone through the pleadings filed herein and have seen the original document of authority filed. I therefore find that the Preliminary Objection raising this issue lacks in merit.

The remaining issue is about the death of the 2nd and 6th Defendants/Respondents. Under Order 24 rule 1, 2 and rule 4 Civil Procedure Rules a Defendant who has died may be substituted if the suit survives him/her. However the application for such substitution must be made within a year. This issue was however never responded to by the Plaintiffs. I do find for the Defendants/Respondents on the said issue as no substitution has been made and yet the 2nd and 6th Defendants have actually died.

I therefore find that the Plaintiffs/Applicants claims against the 2nd and 6th Defendants/Respondents have abated by virtue of the Provisions of Order 24 rule 1 and 3 Civil Procedure Rules.

The Preliminary Objection therefore partially succeeds. The Defendants will get half cost of the Preliminary Objection.

DATED, SIGNED AND DELIVERED AT EMBU THIS 3RD DAY OF JULY 2012.

H.I. ONG’UDI
JUDGE

In the presence of;

Mr. Njoroge for Defendants

Plaintiffs in person

C/c - Njue