



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Nzioka & 2 others (Suing on Their Behalf as Officials of Crescent Self Help Group) v Tropical Blooms Limited (Environment & Land Case 94 of 2019) [2020] KEELC 3995 (KLR) (2 October 2020) (Ruling)

Shadrack Mwamuu Nzioka & 2 others (suing on their behalf as officials of Crescent Self Help Group) v Tropical Blooms Limited [2020] eKLR

Neutral citation: [2020] KEELC 3995 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 94 OF 2019

OA ANGOTE, J

OCTOBER 2, 2020

BETWEEN

**SHADRACK MWAMUU NZIOKA & 2 OTHERS & 2 OTHERS PLAINTIFF
SUING ON THEIR BEHALF AS OFFICIALS OF CRESCENT SELF HELP
GROUP**

AND

TROPICAL BLOOMS LIMITED DEFENDANT

RULING

Introduction:

1. This Ruling is in respect to the Notice of Preliminary Objection dated 16th September, 2019 filed by the Defendant. In the said Notice of Preliminary Objection, the Defendant has averred that the Plaintiffs' Application dated 8th August, 2019 and the entire suit are fatally defective because they offend the mandatory provisions of Order 1 Rule 8 and Order 4 Rule 3 of the Civil Procedure Rules.
2. The Defendant has further averred that the Plaintiffs do not have locus standi or authority to file the Application and the suit in a representative capacity and that the Application and the suit were filed prematurely as the statutory time limit for filing a claim for adverse possession has not been met by the Plaintiffs, whose registration was only effected on 15th January, 2018.



Submissions:

3. The Notice of Preliminary Objection proceeded by way of written submissions. The Defendant's advocate submitted that the requirement of notification under Order 1 Rule 8 is couched in mandatory terms and as such, must be complied with prior to filing the suit.
4. Counsel submitted that the Plaintiffs herein have not issued a notice of the suit to the members of the Crescent Self Help Group and that no evidence has been tendered before the court in proof of compliance with the law. Counsel relied on the case of *Rose Florence Wanjiru vs. Standard Chartered Bank of Kenya Limited & 2 others* [2014] eKLR.
5. Counsel also relied on the case of *Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank* (1992) eKLR which was cited with approval by Angote J. in *Kahindi Katana Mwango & Another vs. Cannon Assurance K. Ltd* (2013) eKLR as follows:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in names of or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules...”
6. Counsel also relied on the provision of Order 1 Rule 13 of the Civil Procedure Rules which provides as follows:

“(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.”
7. Counsel submitted that a reading of the title of the Plaintiffs' pleadings indicates that the three Plaintiffs have filed the instant Application and suit on their own behalf and as the officials of “Crescent Self Help Group” and that the questions for determination as framed in the Originating Summons indicates that the Plaintiffs are seeking to be registered as proprietors of the suit property on behalf of the members of Crescent Self Help Group.
8. It was submitted that a further reading of the Affidavit in support of the Notice of Motion Application as well as that sworn in support of the Summons, both deposed by Shadrack Mwamuu Nzioka, indicates that the authority to swear the Affidavit has been issued by his co-Applicants only.
9. The Defendant's counsel submitted that a further reading of the pleadings indicates that the members of the Crescent Self Help Group have allegedly sub-divided the entire suit property amongst themselves and that the Plaintiffs herein have failed to meet the legal threshold of instituting the subject suit in a representative capacity.
10. It was submitted that for a claim of adverse possession to arise, the party claiming must have been in possession of the subject property for a period of over twelve (12) years; that the suit herein was filed on behalf of Crescent Self Help Group and that the Plaintiffs' documents indicate that Crescent Self



Help Group was registered on 15th January, 2018. It was submitted that even if the Plaintiffs' suit was merited, their right of action has not accrued as the period of limitation has not crystallized.

11. On the other hand, the Plaintiff's/Respondent's counsel submitted that the provisions of Order 1 Rule 8 of the Civil Procedure Rules envisages a situation whereby incase where there are so many individuals having a similar cause of action or interest as against an individual or group of individuals, they can sue either through one of them or some of them unless the court orders otherwise.
12. The Plaintiff's/Respondent's counsel submitted that person[s] commencing a representative suit are obliged by the law to give notice of such suit to all such persons. However, it was submitted, under Order 1 Rule [9] of the Civil Procedure Rules, no suit should be defeated by reason of mis-joinder of parties who are before it.
13. It was submitted that the Plaintiffs herein have locus standi and that annexed to the pleadings is an authority to swear affidavit given by the other Plaintiffs which goes a long way in obliterating the Preliminary Objection.

Analysis and findings:

14. According to the Affidavit of the 1st Plaintiff, the members of Crescent Self Help Group moved and occupied the suit property in the year 2003 without the permission of the registered owner; that the Plaintiffs have sub-divided the suit property measuring 110 acres amongst the members of Crescent Self Help Group and that during this period, the Respondent has never done any acts that has disrupted their quiet enjoyment of the suit property.
15. On the Supporting Affidavit, the Plaintiffs have annexed a signed copy of the three Plaintiffs authorising the 1st Plaintiff to swear Affidavits on their behalf, together with the Certificate of Registration of Crescent Self Help Group which was issued by the Ministry of East African Community, Labour and Social Protection.
16. In the Notice of Preliminary Objection, the Defendant has averred that the Plaintiffs' Application dated 8th August, 2019 and the entire suit are fatally defective because they offend the mandatory provisions of Order 1 Rule 8 and Order 4 Rule 3 of the Civil Procedure Rules, and should be struck out.
17. Order 1 Rule 8 (1) of the Civil Procedure Rules provides as follows:
 - “(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”
18. On the other hand, Order 13 Rule (1) and (2) of the Civil Procedure Rules provides as follows:
 - “(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.”

19. To the extent that not all the members of Crescent Self Help have given the three Plaintiffs written authority to swear and plead on their behalf, it was submitted that the suit offends the above provisions of the law, and that the suit should be struck out.

20. The applicability of Order 1 Rule 8 and Order 1 Rule 13 of the Civil Procedure Rules have been considered by the courts. In the case of Free Pentecostal Fellowship in Kenya vs. Kenya Commercial Bank (1992) eKLR, the court held as follows:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules...”

21. In the case of Kahindi Katana Mwangi & Another vs. Cannon Assurance K. Ltd (2013) eKLR, this court stated as follows:

“Indeed, Order 4 Rule 4 of the Civil Procedure Rules requires that where the Plaintiff sues in a representative capacity, the Plaintiff shall state the capacity in which he sues. The Plaintiff’s Originating Summons does not state whether the Jeuri Community Based Organization, through the two Plaintiffs, suing on behalf of 41 others is a representative suit or not. That, in my view, renders the suit incurably defective. As at the time of filing the suit, the Plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of “JEURI COMMUNITY BASED ORGANISATION” or on behalf of 41 others in accordance with the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010. The Applicant cannot just annex a list of the inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein.”

22. The Plaintiffs in this suit have filed the suit in their own capacity and on behalf of an organization calling itself Crescent Self Help. Although the members of the Crescent Self Help Group have not given the three Plaintiffs written authority to swear Affidavits and plead on their behalf, the 2nd and 3rd Plaintiffs have done so.

23. To the extent that the three Plaintiffs have pleaded that the suit is brought on their own behalf, and the other two Plaintiffs having given the 1st Plaintiff authority to sign the Affidavit on their behalf, this suit is sustainable, but only in respect to the three Plaintiffs, and not any other member of Crescent Self Help Group.

24. The other members of the Group that never gave the 1st Plaintiff written authority to swear and plead on their behalf cannot be said to be parties to this suit as Plaintiffs.

25. In the circumstances, and considering the provisions of the law, this suit can only proceed on the basis that it is only the three Plaintiffs who are claiming the suit property, and not any other member of Crescent Self Help Group. I say so because this being a representative suit, all the members of the Group should have given the Plaintiffs written authority to plead, appear and act on their behalf.

26. The Defendant’s advocate has also submitted that for a claim of adverse possession to arise, the party claiming the land must have been in possession of the subject property for a period of over twelve



- (12) years; that the suit herein was filed on behalf of Crescent Self Help Group and that the Plaintiffs' documents indicate that Crescent Self Help Group was registered on 15th January 2018.
27. According to the Defendant, since the Crescent Self Help Group was registered on 15th January 2018, a period of twelve (12) years had not lapsed, meaning that the suit was prematurely filed.
28. The issue of whether the Plaintiffs have been in occupation of the suit property uninterrupted since the year 2003 as pleaded can only be determined after trial. Indeed, the fact that the organization to which the Plaintiffs belong, and which has been used as a vehicle for the filing of the suit, was registered in the year 2018, cannot vitiate the claim by the members of that organization that they were in occupation of the suit property long before the organization was registered.
29. In a claim of adverse possession, the court is not concerned with when the Plaintiffs' organization was registered, but rather, when each Plaintiff entered the suit land, and the circumstances of the said entry. According to the Plaintiff, the Plaintiffs entered the suit land in the year 2003. That is the year (2003) that the court will interrogate at trial or during the hearing of the Application for injunction for the purposes of ascertain the Plaintiffs' claim
30. For those reasons, I find the Defendant's Notice of Preliminary Objection dated 16th September, 2019 to be unmeritorious. The Notice of Preliminary Objection dated 16th September, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE

