



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 067 of 2009

JACKSON P. MURIMI KINYUA.....1ST PLAINTIFF

ROBERT GICHURU NYANJUI.....2ND PLAINTIFF

MAUREEN NYAMAATUR KIBURI.....3RD PLAINTIFF

ERIC GITONGA BENGI.....4TH PLAINTIFF

JAMES MAINA MUHORO.....5TH PLAINTIFF

JOHN W. GIKONYO.....6TH PLAINTIFF

VERSUS

KENYA FOREST SERVICES.....DEFENDANT

R U L I N G

1. The Plaintiffs filed their application dated 23/02/2009 under Certificate of Urgency seeking an injunction to restrain the Defendant, by itself, its agents, its servants and others from interfering with the Plaintiffs' occupation, quiet enjoyment development and/or alienation or other activities of the parcels of land known as 24371/35, 24371/36, 24371/43, situate in South of Kiambu Municipality and a permanent injunction restraining the Defendant from interfering with the Plaintiffs' rightful enjoyment of the suit properties pending the hearing and determination of the suit.

2. Before the application could proceed, the Defendant raised a Preliminary Objection seeking to strike out the Plaintiffs' entire suit on grounds that the Plaintiff's suit and the application do not comply with Order 1 Rule 12 and Order VII Rule 1(2) of the Civil Procedure Rules; both of which provide –

“Order 1 Rule 12

12(1) where there are more Plaintiffs than one, anyone 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 a 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.

Order VII Rule 1(2)

“The plaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the plaint.”

3. The Defendant’s contention is that the only Verifying Affidavit in this case is the one sworn by the 6th Plaintiff, Mr. John Wainaina Gikonyo and that the rest of the Plaintiffs have not sworn affidavits verifying the correctness of the averments in the plaint. The Defendant argues further that the spirit of the law under Order VII Rule 1(2) of the Civil Procedure Rules is that each and every Plaintiff should own their suit and that since there are 6 parcels of land involved in this case, the 6th Defendant cannot purport to vouch for the correctness of the averments concerning parcels other than his own. It is the Defendant’s submissions that if the other Plaintiffs had, for whatever reason, been prevented from filing their own Verifying Affidavits, they should have given written authority to the 6th Plaintiff pursuant to the provisions of Order 1 Rule 12(2) of the Civil Procedure Rules. The Defendant says therefore that in the absence of the Verifying Affidavits by the first 5 Plaintiffs, and the authority required by Order VII Rule 12(2) of the Civil Procedure Rules which is couched in mandatory language, the Plaintiff’s suit is a nullity and should be struck out.

4. In Court of Appeal Civil Appeal No. 321 of 2003; between **Research International East Africa Ltd. and Julius Arisi & 213 Others**, the Court of Appeal held, inter alia, that –

*“In our view, the true construction of rule 1(2) of Order VII Civil Procedure Rules is that even in cases where there are numerous Plaintiffs, each Plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-Plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the **Grace Ndegwa’s** case (supra) and rule 12(1) of Order 1 Civil Procedure Rules leave no doubt that one or more of the co-Plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-Plaintiffs with their authority in writing”.*

5. Regarding the provisions of Order 1 Rule 1 of the Civil Procedure Rules, the Court of Appeal in the same Research International case (above) had this to say:-

“..... each of the Plaintiffs is personally responsible for the conduct of his own suit. ---- has any right to take any steps in the suit on behalf of any other Plaintiff without the express authority in writing.”

6. While not denying that the first 5 Plaintiffs have not filed any Verifying Affidavits as required by law, the Plaintiff’s counsel contends that this objection by the Defendants was calculated merely to delay the proceedings in this case. Counsel also contends that Order VII Rule 1(2) of the Civil Procedure Rules is not applicable as the rule does not provide for the form of verification required, and further that since there is a Verifying Affidavit on the record, the Plaintiffs have met the requirements of Order VII Rule 1(2). The Plaintiffs urge the court not to strike out the suit but to allow the Plaintiffs, if the court finds the one Verifying Affidavit insufficient, to either file the other Verifying Affidavits or the 6th Plaintiff to file the required authority.

8. Which way should the court go in this case? In the case of **Microsoft Corporation vs Mutsami Computer Garage Ltd. & Another [2001] KLR 470** Ringera J (as he then was) when faced with a similar predicament had this to say-

“Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. In my opinion, where it is evident that the Plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate a procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In these instances the court should rise to its higher calling to do justice by saving the proceedings in issue.”

9. I think it was with the above position in mind that the Rules Committee introduced Sections 1A of the Civil Procedure Act, namely the overriding objective principle which empowers the court, in the exercise of its powers under the Act or the interpretation of any of its provisions, to seek to give effect to the principle of facilitating “the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

10. In light of the above provisions, I would be slow to strike out the Plaintiffs’ suit. In the instant case, the Defendant’s complaint does not go to the jurisdiction of this court, nor does the omission by the Plaintiffs prejudice the Defendant in any fundamental respect.

11. In that regard, I direct that the Plaintiffs shall file the appropriate authority for the 6th Plaintiff to make the Verifying Affidavit on behalf of the rest of the Plaintiffs, or if they so wish each of the first 5 Plaintiffs should file their own Verifying Affidavits, whichever option is taken compliance must be within fourteen (14) days from the date hereof, failing which the entire suit together with the application shall stand struck out with costs.

12. The Plaintiffs shall bear the cost of this objection.

Dated and delivered at Nairobi this 6th day of October, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Miss Telewa (present) for the Plaintiff/Applicant

Mr. Chabenza (present) for the Defendant/Respondent

Weche – court clerk