



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 266 OF 2014

MARY VANDE

LABAN AMUNGA WILLIAM

ALICE NALIKA ATILA.....PLAINTIFFS

VERSUS

JANE ANYANGA.....DEFENDANT

JUDGEMENT

This case is that at all material times to this suit the 1st plaintiff is the owner of Plot No. 10 at Eshihongo Market, the 2nd plaintiff is the owner of Plot No. 11 Eshilongo market while the 3rd plaintiff is the owner of Plot No. 14 at Eshilongo market. The plaintiffs aver that the suit plots herein were created from the sub division of Plot No. 7 Eshilongo market after which they were allocated the same by the former County Council of Kakamega and granted permission to occupy and develop. The plaintiffs aver that they complied with the terms of payment of rates as required by the county regulations. The plaintiffs aver that without any justifiable cause and/or authority the defendant has unlawfully moved and/or trespassed onto their plots No's 10, 11 & 14 at Eshilongo market and started constructing illegal and permanent structures therein. The plaintiff avers that the action of the defendant has deprived the plaintiffs their rights to own and use their property which amounts to trespass which is continuing unabated. By reason of the matter aforesaid the plaintiffs have been deprived of the use and enjoyment of their plots and have thereby suffered loss and damage. The plaintiffs have requested the defendant to stop trespassing onto their plots and instead the defendant has vowed to move on with the construction work and has refused to heed the plaintiffs' request. The defendant has threatened and intends unless restrained by the court, to continue to trespass upon the plaintiffs' properties as foreseen and which she has no colour of right over the same. The plaintiffs' claim against the defendant is for an order of permanent injunction restraining the defendant whether by herself, servants, agents or otherwise whoever from alienating or whosoever is acting under her direction from trespassing, constructing, digging trenches, disposing building materials or in any other manner interfering with the plaintiff peaceful user of plot Nos. 10, 11 and 14 at Eshihongo market. The plaintiffs pray for judgment against the defendant jointly and severally for:-

(a) An order of permanent injunction restraining the defendant whether by herself, servants, agents or otherwise whoever from alienating or whosoever is acting under her direction from trespassing, constructing, digging trenches, disposing building materials or in any other manner interfering with the plaintiff peaceful user of plot Nos. 10, 11 and 14 at Eshihongo market.

(b) Costs and interest of this suit.

The defendant avers that Plot No. 7 Eshikongo Market was given to Eshihongo Maji Women Group, which is a duly registered Self Help Group and not the defendant herein or the plaintiffs in 1993 and which the said group has been and still is in actual occupation and possession. The defendant further avers that at no time was the said plot No. 7 Eshikongo market subdivided to create the alleged plot Nos 10, 11 and 14. The defendant avers that the developments carried thereon in plot No. 7 Eshihongo market are legal and were or are being carried by Eshihongo Maji Women Group and not the defendant. The defendant further avers that the plaintiffs' suit herein is misconceived and an abuse of the due process of law as the plaintiffs have sued the wrong party as the plaintiffs are aware who the owner and the person who have carried out the developments on plot No. 7. The defendant states that she is a member of the group which has twenty members. She has been sued personally yet the plot does not belong to her.

This court has considered the evidence and the submissions herein. The preliminary issue to be determined before going into the merits of the case is whether the defendant is the correct party to be sued. It is not in dispute that the suit plot in this case Plot No. 7 Eshikongo Market was originally allocated to Eshihongo Maji Women Group, which is a duly registered Self Help Group. The plaintiffs maintain it was later repossessed by the County Council of Kakamega, subdivided into three and was allocated to them. In their plaint dated 2nd July 2014 the plaintiffs have sued the defendant personally.

In the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others (2017) eKLR, the court held that;

“This court is acutely aware of the position that a plaintiff is dominus litis, and can sue whomever he or she thinks will obtain relief from; and that a plaintiff cannot be forced to sue somebody whom he or she has not chosen to sue. Further, where a plaintiff sues a wrong party he or she has to shoulder the blame”.

In Free Pentecostal Fellowship in Kenya vs KCB NRB HCC 5116/2002(OS) Bosire J(as he then was) stated:

“the position in 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 CPR. In the instant case, the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so, it lacked the capacity to institute proceedings in its own name.”

I am also persuaded by the ruling in Football Kenya Federation v Kenyan Premier League Limited & 4 others (2015) eKLR where the Judge stated that;

“I reiterate that a proper party is one who is recognized under the law as having the legal persona to sue and be sued, and one who is impleaded in a suit, not those sitting on the hedge waiting to be enjoined. And until such proper parties are enjoined by, either, an order of the court, or without such order, where pleadings have not closed, by way of an amendment, they remain mere observers to the proceedings.

Having conscientiously examined this point, I find that it goes to the root of the matter, and I would not belabor applying the Oxygen Principle and the substantive justice principles of Article 159, which principles only apply to parties who are before the court. In this case, the court would be going on a fishing expedition or on its own frolic to try and clothe nonparties with the capacity to litigate if I were to rule otherwise”.

Further in Trusted Society of Human Rights Alliance vs Mumo Matemu & 5 Others 2014 eKLR the court observed that;

“a suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Act, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it.....”

In the present case the plaintiffs did not attempt to even orally amend their pleadings to include the name of the Group as the defendant despite admitting that the plot belonged to Eshihongo Maji Women Group. Despite the same also having been pleaded in the defence drawn and filed way back on the 18th August 2014. They maintain in their submissions that it is the defendant who has trespassed. I find that parties are bound by their pleadings and it would be absurd to consider and determine this matter against the wrong party. Having found so it would be pointless to go onto the merits and demerits of this case. I find this suit is unmerited and I strike out the same with costs to the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE