



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.185 of 2015

NYAKACH WOMEN GROUP.....PLAINTIFF

VERSUS

PHOEBE ANUNDA ODERO.....1ST DEFENDANT

BENTER ATIENO ODERO.....2ND DEFENDANT

ESTHER AWINO ODERO.....3RD DEFENDANT

RULING

1. **Nyakach Women Group**, the Plaintiff, through the Notice of motion dated 23rd March 2017 seeks for leave to institute a representative suit for and on behalf of members of the Plaintiff Women Group. They also seek for leave to amend the plaint filed on the 23rd July 2015 and costs. The application is based on the five (5) grounds on its face and supported by the affidavit sworn by Linet Adhiambo Opiyo on the 21st March 2017, to which is annexed a copy of the draft amended plaint.

2. The application is opposed by **Benter Atieno Odero, the 2nd Defendant**, through the replying affidavit sworn on her own behalf and that of Esther Awino Odero, the 3rd Defendant, on the 28th April 2017.

3. The application came up for hearing on the 18th May 2017 when counsel for the parties consented to file and exchange written submissions. The counsel for the Plaintiff filed their written submission dated the 13th September 2017 while counsel for the Defendant filed theirs dated 2nd October 2017.

4. The issues for determination by the court are as follows;

a) Whether the suit filed by the Plaintiff, who lacks legal capacity to sue in its name, can be saved through the prayers sought in the notice of motion.

b) Who pays the costs.

5. The court has considered the grounds on the notice of motion, the affidavit evidence, the written submissions, authorities cited by both counsel and come to the following findings;

a) That this suit was commenced by Nyakach Women Group as the Plaintiff through the plaint dated 3rd July 2015 and filed on the 23rd July 2015. The Plaint is signed at page 3 by undisclosed person described as "PLAINTIFF'S CONTACT PERSONS." The Plaintiff at paragraph 1 of the plaint describes the Plaintiff as "a Self Help Group/Project registered with the office of the District Gender and Social Development Officer (DGSDO) Kisumu....."

b) That the 2nd and 3rd Defendants filed their statement of defence dated 3rd November 2015 on the 18th November 2015. That at paragraph 10 of the said defence they avers that "this suit is fundamentally and irredeemably defective ab intio as the Plaintiff lacks capacity to sue and shall apply that the same be dismissed and/or struck out with costs at the first hearing." That the Plaintiff filed a reply to the said statement of defence signed by Linet A. Opiyo, described as Chairlady Nyakach Women Group, dated 14th December 2015.

c) That the notice of motion dated 23rd March 2017 is therefore meant to primarily circumvent the 2nd and 3rd Defendants preliminary objection contained at paragraph 10 of their defence.

d) That while **Order 1 Rule 9** of the Civil Procedure Rules provides that “No suit shall be defeated by reason of misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards to the parties actually before it,” the Defendants have In their replying affidavit questioned the legal capacity of the Plaintiff to file and sustain the suit. The learned counsel for the 2nd and 3rd Defendants has referred the court to the case of **Football Kenya Federation –V- Kenya Premier League Limited & 4 others** [2015] eKLR and asked the court to find that the Plaintiff is not a legal entity for purposes of filing suit in its name, and that amending the plaint will not salvage the suit. That the court finds that Nyakach Women Group, not being an incorporated body is not a legal person and hence lacks capacity to file and sustain this suit in its name.

e) That the notice of motion dated 23rd March 2017 invokes **Order 1 Rule 8 (1) (2), Order 8 Rules 3 and 5** of the Civil Procedure Rules among others. That while **Order 1 Rules 8 of the Civil Procedure Rules** makes provision for representative suits, **Order 8 Rules 3 and 5 of Civil Procedure Rules** deals with amendment of pleadings with leave. That as only a legal entity has capacity to move the court and in view of the finding in (d) above, the court finds that Nyakach Women Group is not a legal person with capacity to file and sustain this suit. That it follows that Nyakach Women Group has no legal capacity to seek for orders of amending the plaint or filing suit in a representative capacity as they seek to do through this application.

f) That Nyakach Women Group should have considered withdrawing the entire suit the moment it became apparent to them that they had no legal capacity to file and sustain this suit in its name. That would have paved the way for filing of a fresh suit to pursue the same claim through legally recognized parties.

6. That having come to the foregoing findings, the court orders as follows;

a) That the notice of motion dated 23rd March 2017 is without merit and is dismissed with costs.

b) That in appreciation and exercise of the court’s authority and duty under **Articles 159 (2) (b)** of the Constitution, **Section 1A, 1B and 3B** of the Civil Procedure Act, Chapter 21 of Laws of Kenya and **Section 19 (1)** of the Environment and Land Court Act No.19 of 2011, the suit commenced by the Plaintiff through the plaint dated 3rd July 2015, and filed on the 23rd July 2015 is

hereby struck out with costs for the Plaintiff’s lack of legal capacity to sue and sustain this suit. This will give the members and officials of the group an early opportunity to seek legal advice on how to pursue their interest without undue delay.

c) That the file be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2ND DAY OF MAY 2018

In presence of;

Plaintiff Secretary present

Defendant Absent

Counsel Mr. Onsongo for Olel for Plaintiff

Mr. Bagendo for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE