



Muli & others v Kenya Ports Authority & 2 others (Environment & Land Case 84 of 2002) [2024] KEELC 316 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 84 OF 2002**

**NA MATHEKA, J
JANUARY 31, 2024**

BETWEEN

RAPHAEL MULI AND OTHERS PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

RULING

1. The 1st Defendant raised a Preliminary Objection to the effect that;
 1. That as the suit was filed and orders obtained without proper compliance with Order 1 Rule 8 the proceedings herein including the application pending before the Court are all a nullity and therefore orders ought not to be granted and suo moto the suit be dismissed by the Court with costs.
 2. That no adverse possession can be claimed against the Government and therefore the reliefs sought are not justiciable.
2. This court has considered the preliminary objection and the submissions therein. Order 1 Rule 8 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 parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.
 - 3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to be made a party to such suit.
3. Order 1 Rule 13 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.
4. In the case of [Kabindi Katana Mwangi & another v Cannon Assurance \(K\) Ltd](#) (2013) eKLR where the Court stated as follows;
- "indeed, Order 4 Rule 4 of the [Civil Procedure Rules](#) requires that the Plaintiff sues in a representative capacity, the plaint 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 other 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 the purports to be acting which is not signed by any of persons listed herein."
5. The 1st Defendant in their submissions relied in the case of [Yiapas Ole Seese & 4 others v Sakita Ole Narok & 2 others](#) (2008) eKLR where the Court of Appeal stated as follows;
- "The whole purpose of provisions of Order 1 Rule 8 is to ensure that all persons with unlitigated similar cause of action are desirous of having their cause determined are included in this suit for their own convenience and to obviate a multiplicity of suits. Hence the need to notify them of the Institution of the suit so that in case any of them wishes to take part he is given the opportunity to do so.....Until notices under orders 1 Rule 8 [Civil Procedure Rules](#), are served, one may not know whether or not they will accept being treated as Plaintiffs. Services of the notice as we stated earlier. It to give them an opportunity to make an election whether or not to become parties."
6. Be that as it may, in the case of [Ahmed Dolai & others suing on their behalf and on behalf of 27 members of Likoley Farmers v Kengen & another](#) (2018) eKLR the Court held as follows;
- "...that the spirit of the law in requiring notice to be given to persons likely to be affected in the case of representative nature is a procedural requirement that cannot be elevated to a fetish for non compliance. The rule should not be treated as a rigid matter of principle but a flexible tool of convenience in the administration of justice to the parties..."



7. The Plaintiffs also relied on the case of *Jack Mukhongo Munialo v Nzoia Sugar Company Ltd & another* (2017) eKLR where the Court stated as follows;

...the above in my view is not a reason to strike out the entire suit taking into account that it is not fatal at this stage since the suit is still in its infancy stage and giving due regard to Article 159 of the *Constitution*. The Plaintiff still has opportunity to comply...”

8. There is no doubt that the Plaintiffs’ suit is a representative suit. The Purpose of order 1 Rule 8 of the *Civil Procedure Rules* was to alert members who have a common interest in a suit to apply to be joined in the suit. In the instant case, the dispute herein involves over 300 people. They gave their authority in writing as per the list attached which is on record for purposes of compliance with order 1 Rule 13 of the *Civil Procedure Rules*.

9. The Court of Appeal decision in the case of *Yiapas Ole Seese (supra)* was determined pre 2010 Constitution when matters were being dismissed on technicalities. This court is hesitant to strike out cases on procedural technicalities unless what is omitted goes to the root of the case. On the issue of whether this is government land and /or whether or not it is subject to adverse possession is a matter of evidence which would be determined during the trial and not at this preliminary stage. I therefore find no merit in the preliminary objection which is hereby dismissed with costs to the Plaintiffs. Parties are advised to comply with Order 11 and set down this suit for hearing.

10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

