



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 10 OF 2017

AHMED DOLAL, MUSA AHMED, FATUMA KADID 7 OTHERS

SUING ON THEIR BEHALF AND ON BEHALF OF 27 MEMBERS

OF LIKOLEY FARMERS.....PLAINTIFFS

VERSUS

KENGEN.....1ST DEFENDANT

KENYA POWER AND LIGHTING CO. LTD.....2ND DEFENDANT

RULING

INTRODUCTION

The Plaintiff commenced this suit by a plaint filed on 18th August, 2005 seeking general damages and an injunction against continued spillage of harmful substances from the Defendant's premises to the Plaintiffs farmlands. On 19th September, 2005, the first Defendant through the firm of Njeri Mburu filed her statement of defence and on 16th September 2005, the 2nd Defendant filed her defence through the firm of C.P Onono & Co. Advocates. The Plaintiffs later sought leave to amend the plaint which leave was granted. At the close of pleadings, the firm of Nchogu, Omwanza & Nyasimi Advocates for the 1st Defendant filed a Notice of Preliminary objection dated 19th June, 2018 on the following grounds:

- 1. THAT the Plaintiff cannot completely prosecute the suit as filed as they failed to seek and issue the notice contemplated under Order 1 Rule 8 (2) CPR 2010 and that the Plaintiffs instituted the suit without the knowledge and consent of the other purportedly affected parties.**
- 2. THAT this Honourable Court does not have jurisdiction to adjudicate over the amended plaint amended on 10th May, 2011 for non-compliance with Order 1 Rule 8 (2) CPR, 2010.**
- 3. The Amended Plaint amended on 10th day of May, 2011 herein is ex-facie incompetent, fatally defective and greatly misconceived.**

When this matter came up for hearing on 20/6/2018, the following directions were taken by consent of the parties:

- 1. The 1st Defendants Notice of Preliminary Objection dated 19th June, 2018 to be heard on priority basis.**
- 2. The said Preliminary Objection dated 19th June, 2018 to be disposed of by way of written submissions.**
- 3. The Plaintiff to file a response to the said Preliminary Objection by way of a replying affidavit within ten (10) days from today's date.**
- 4. Thereafter the 1st Respondent to file and serve her written submissions within 14 days from the date of receipt of the response by the Plaintiff.**
- 5. The Plaintiff and the 2nd Defendant to file and serve their written submissions within 14 days from receipt of submissions from the 1st Defendant.**

6. Mention on 02nd August, 2018 for further directions.

SUBMISSIONS BY THE 1ST DEFENDANT

The first Defendant submitted that the Plaintiffs are farmers suing on their own behalf and on behalf of 27 others. As such, the suit becomes a class suit. The 1st Defendant also submitted that Order 1 Rule 8 (2) CPR 2010 requires person(s) who have filed a class suit to issue notices to the individuals on whose behalf the suit is lodged. The 1st Defendant also submitted that she did not notify the Plaintiff's on his objection in the defence and that does not render the preliminary objection defective. He cited the following case in support of the preliminary objection.

1. *Yiapas Ole Seese & 4 others –Vs- Sakita Ole Narok & 2 Others (2008) eKLR*

2. *Rose Florence Wanjiru –Vs- Standard Chartered Bank of Kenya Ltd & 2 Others (2014) eKLR*

3. *Ibrahim Buwembo, Emmanuel Sserunjogi, Zubairi Muwanika for and on behalf of 800 others –Vs- Utoda Ltd. HCCC No. 664 of 2003*

4. *Adero Adero & Another –Vs- Ulinzi Sacco Society Ltd (2002) eKLR*

PLAINTIFFS SUBMISSIONS

The Plaintiffs filed grounds of opposition dated 19th September, 2018 opposing the preliminary objection in which they raised six (6) grounds. In their submissions, the Plaintiffs stated that this case was filed in 2005 and the rules as they existed then differ from the current rules which were amended in 2010. The Plaintiffs submitted that the rule was radically amended after the filing of this suit and that they did comply with the requirements of the law as at the filing of the suit.

They also contend that the Plaintiffs are members of a known and registered group namely Likoley Farmers Group who were identified and knew about the institution of this suit. They submitted that the officials brought the suit on their own behalf and on behalf of the group and that no person will be prejudiced by the institution of this suit.

The Plaintiff further submitted that the purpose of Order 1 Rule 8 CPR is to enable any person with unlitigated similar cause decide whether to be included in the suit and to avoid multiplicity of cases and not to enable the court to satisfy itself that it is dealing with the proper Plaintiff with genuine authority and lawful permission to litigate the dispute on behalf of aggrieved class members as submitted by the 1st Defendant.

The Plaintiff further stated that non-compliance with the requirement to give a notice does not render the suit fatally defective and that if at all there was failure to comply with the rule, the court may order that the proper procedure be complied with since the 1st Defendant will not be prejudiced. The Plaintiff cited the case of **John Rees & Others Martin & Another –Vs- Davies & Others (1969) 2 All ER 283**. The Plaintiffs referred to Article 159 (2) (d) of the Constitution of Kenya, 2010 where the courts are enjoined to administer justice without undue regard to procedural technicalities.

The Plaintiff also submitted that failure to serve a notice as per Order 1 Rule 8 CPR is not fatal but a tool of convenience. They submitted that the overriding objective is to ensure substantive justice is done. Finally, the Plaintiffs submitted that this suit cannot be rendered incompetent without the consent of the other purported affected members. They submitted that the Plaintiffs had the consent and authority of the other members of Likoley Farmers Group and that that would require the filing of an affidavit as it is a matter of fact. They stated that that cannot be a preliminary objection properly called as it cannot be raised if any fact pleaded by the opposite side are to be ascertained.

ANALYSIS AND DECISION

The Notice of Preliminary Objection dated 19th June, 2018 raises three (3) grounds. The first ground is that the suit herein was instituted without the knowledge and consent of the other purportedly affected persons. Order 1 Rule 8 (1) (2) and (3) provides as follows:

“8 (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

(2) The court shall in such case direct the Plaintiff to give notice of the institution 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.”

The practice has always been that where a representative suit is being instituted, the one or more persons instituting the suit also file a list of the numerous persons having the same interest and their signatures signifying their consent and authority to institute such a suit.

The purpose of that provision was well put in the case of **Yiapas Ole Seese & 4 Others –Vs- Sakita Ole Narok & 2 Others (2008) eKLR** where the court held:

“The whole purpose of the provisions of Order 1 Rule 8 is to ensure that all persons with unlitigated similar cause of action who are desirous of having their cause determined are included in the 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 Order 1 Rule 8, Civil Procedure Rules, are served, one may not know whether or not they will accept being treated as Plaintiffs. Service of the notice as we stated earlier, is to give them an opportunity to make an election whether or not to become parties.”

My plain reading of Order 1 Rule 8 is that such a notice is not a mandatory requirement that can render a suit fatally defective for non-compliance. The spirit of the law in requiring notice to be given to persons likely to be affected in the case of a 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. That was the reasoning of the court in the case of **Rees & Others, Martin & Another –Vs- Davies & Others (1969) 1 All ER 283** where the court stated:

“ The rule as to representative proceedings should be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice and should be applied, not in any strict sense, but according to its wide and permissive scope.”

The other issue being raised in the preliminary objection is whether this Honourable Court has jurisdiction to adjudicate over the Amended plaint for non-compliance of Order 1 Rule 8(2) CPR. From the 1st Defendant’s statement of defence, the jurisdiction of this court has not been denied. A party is bound by his pleadings. The 1st Defendant has not demonstrated how non-compliance of Order 1 Rule 8 CPR affects the court’s jurisdiction to hear and determine this suit. That limb of the preliminary objection in my respective view is superfluous and the same fails. In regard to the third and last ground, I also find nothing incompetent with the Amended plaint. The plaint was amended pursuant to the leave of this Honourable Court. The 1st Defendant was served with that application for amendment and the draft amended plaint which he did not oppose. The first Defendant cannot be heard to challenge the amended plaint after the court granted leave for Amendment. In the upshot, I find the Notice of Preliminary Objection dated 19th June, 2018 lacking merit and the same is hereby dismissed with costs to be in the cause.

Read, Delivered and Signed in the open court this 17th day of October, 2018.

E. C. Cherono

ELC JUDGE

In the presence of:

1. Mr. Onono for 2nd Defendant
2. Mr. Musyimi for 1st Defendant
3. Court Clerk: Ijabo