



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 74 OF 2016
IN THE MATTER OF LOSESIA GROUP RANCH
AND
IN THE MATTER OF WASO EAST ADJUDICATION SECTION
TITLE NUMBERS SAMBURU/EAST WASO/1 TO 43
IN THE MATTER OF LAND
(GROUP REPRESENTATIVES ACT CHAPTER 287)

BETWEEN

DANIEL MOMAGUL KANDEI 1ST PLAINTIFF
RAPHAEL LEKILWAI 2ND PLAINTIFF
LEIMBIAN LASANGURUKURI 3RD PLAINTIFF

-VERSUS-

KAMANGA HOLDINGS LIMITED & 44 OTHERS.....DEFENDANTS

RULING

Introduction

1. This ruling is in respect of the notice of preliminary objection dated **6th May, 2016** and the applications (motions) dated **24th April, 2016** and **28th June, 2016**.
2. As the notice of preliminary objection is capable of determining the issues raised in this suit preliminarily, I will deal with it first.
3. The notice of preliminary objection (P.O) is premised on the grounds that:
 - a) The plaintiffs/applicants have no capacity to sue in their own name whilst claiming interest

vested under the Land (Group Representatives) Act Cap 287 Laws of Kenya, on behalf of Losesia group ranch thus institution of the present application has no basis in law;

b) The orders sought cannot be granted against the respondents as requested in the application before court because the honourable court lacks jurisdiction to hear and determine matters in respect of title, ownership and interest in land which is vested in the Environment and Land Court;

c) The application offends the provisions of **Order 37** of the Civil Procedure Rules, 2010 as the applicants do not fall within the category of persons who may institute suit vide an originating summons hence the application has no basis upon which it can stand;

d) The application offends the provisions of the Land Adjudication Act in that, the claim is statute barred in terms of **Sections 29** and **30** of the Act as there was no action taken within the period of 60 days after determination of objections raised.

4. The preliminary objection and the applications were disposed of by way of written submissions.

The 2nd-48th Defendants submissions

5. On behalf of the 2nd to 48th defendants, it is submitted that there is no evidence that the suit and the application thereunder has been brought with the consent and authority of the other members of the group and that it is not indicated in the pleadings who the persons who have brought the suit are or whether they have authority of the group to bring the suit as required by **Section 7(3)** of the Land (Group representatives) Act, Cap 287 (hereafter referred to as the Act) ; that under the Act, it is the group in its corporate name that has capacity to sue and be sued. In that regard, reference is made to the case of **Nkol Risha Ole Ntomo Kenery & 4 Others v. Chairman Larngosua Group Ranch & 9 others, Nairobi HCCC No. 269 of 2001** and submitted that under **Section 8(1)** of the Act, it is the group representatives who are conferred with the power to sue and be sued and that officials of the group or the group members have no capacity to sue in their official or individual names.

6. The group ranch is likened to a company where individual shareholders have no right to enforce rights of action vested in the company unless by way of a derivative suit. It is pointed out that even in the case of a derivative suit, leave of the court is required to institute a suit.

7. Concerning the mode of institution of the suit, a number of cases are cited concerning the use of originating summons as a method of instituting suits, and submitted that the plaintiffs are not in the category of the persons allowed to take up an originating summons under **Order 37 Rule 1** of the Civil Procedure Rules. The questions sought to be determined are also said to be outside the ambit of the questions that can be handled through an Originating Summons.

8. Reference is made to the cases of **Bhari v. Khan (1965) E.A 94; James Kibutiri vs. Kibutiri (1983) KLR 62 and Wakf Commissioners v. Mohammed (1984)KLR 346** and because of the issues raised in this suit, it is submitted that the court has no jurisdiction to hear such a complex matter when it is brought by way of originating summons.

9. Further reference is made to **Order 37 Rule 8** of the Civil Procedure Rules and submitted that the rule expressly prohibits the court from entertaining a claim for cancellation of a title registered under the Registered Land Act by way of originating summons.

10. Maintaining that the suit herein cannot be determined on the basis of the filed pleadings, based on the case of of **Siasa Pasua & 2 others vs. Mabruk Khamis Mohamed & Another (2012)eKLR**, it is submitted that a suit filed contra- statute cannot be saved by the oxygen principle or the provisions of **Article 159** of the Constitution.

11. Based on the provisions of **Section 28** of Land Adjudication Act, it is submitted that the jurisdiction of this court is merely supervisory as opposed to being adjudicatory. Because no objection was lodged

against the adjudication process that gave rise to the impugned titles, it is submitted that the proceedings ought to have been challenged within 6 months by way of judicial review.

12. Because the suit was not filed within 12 months in compliance with the Government Proceedings Act, it is said to be time barred.

Submissions by the 1st Defendant

13. On behalf of the 1st defendant, it is reiterated that the plaintiffs do not fall in the class of persons who are permitted to take up a summons under **Order 37 Rule 1** of the Civil Procedure Rules and that owing to the fact that the questions framed by the plaintiffs for determination are numerous and the defendants many, the case cannot be determined by way of originating summons.

Plaintiffs' submissions

14. On behalf of the plaintiffs, it is submitted that Lossesia Group Ranch is a registered group ranch under the Act and submitted that under **Section 8** of the Act, the elected group representatives have powers similar to those of directors of a company. The foregoing notwithstanding, it is contended that under **Section 8(2)** of the Act, all powers exercised by the group officials must be for the benefit of all members of the group. In this regard, full and effective consultation must be done. According to the plaintiffs, where the group representatives fail to conduct themselves as required of them in the Act, members may solely or collectively sue.

15. Concerning failure to bring the case in the name of the group as by law required, it is contended that the group in its corporate name has not done anything wrong to its members to warrant being sued in its corporate name.

16. Because the officials are the culprits, it is submitted that they can be sued alongside any other third party who acts together with the officials to defeat the objectives of the group ranch and the laws governing it.

17. With regard to appropriateness of Originating summons to institute the claim, it is submitted that this court has a duty to receive and hear all parties where none is prejudiced by the form of pleadings.

18. As the relationship between officials of the group ranch and its members is fiduciary, it is submitted that the issue raised in this case squarely falls under **Order 37** of the Civil Procedure Rules.

19. Concerning the contention that the Land Adjudication Act ousts the jurisdiction of this court to entertain suits originating from the statute, it is submitted that the law merely prohibits the court from entertaining a suit before the appeal process outlined in the Act is concluded.

20. It is pointed out that the process contemplated under the Land Adjudication Act has been completed and titles issued, and contended that what is under challenge is the illegal and unlawful excision of land noted for Lossesia Group Ranch to strangers and officials of the group ranch disguised as land adjudication.

21. The plaintiffs accuse the respondents of having acted unlawfully in acquisition of the titles they have. In effect, the plaintiffs are challenging the titles held by the defendants/respondents.

22. Arguing that evidence is required to determine the issues raised in the P.O, it is submitted that the P.O does not meet the threshold set in the Mukisa Biscuits case.

Analysis and determination

23. From the notice of preliminary objection and the submissions in respect thereof, I find the issues for determination to be:

1. Whether the plaintiffs have capacity to sue in their own name whilst claiming interest vested under the Land (Group Representatives) Act on behalf of Lossesia group ranch?
2. Whether the application offends the provisions of **Order 37(1)** of the Civil Procedure Rules?
3. Whether this court has jurisdiction to hear the dispute brought before it?

Whether the plaintiffs have capacity to sue in their own name whilst claiming interest vested under the Land (Group) Representatives Act on behalf of Losesia group ranch?

24. Concerning the first issue, having read the provisions of **Sections 5, 7 and 8** of the Act, and the cases of **Simon Tapai Santento Kimnyak Ole Sale (Suing on behalf of 78 Olepols Village Members) v Ita Ole Bulati & 8 others** [2011] eKLR and **Nkol Risha Ole Ntomo Kerery and 4 others v. Chairman Larngosua Group Ranch & 9 Others** Nairobi HCCC No. 269 of 2001, I agree with the defendants that the plaintiffs not being the group representatives contemplated under the aforementioned sections of the law, have no capacity to sue on behalf of the group ranch, the members of the group ranch or on their own behalf.

25. In the case of **Simon Tapai Santento Kimnyak Ole Sale (Suing on behalf of 78 Olepols Village Members) v Ita Ole Bulati & 8 others** (supra), **Wendoh J.**, observed:

“It does not seem to be in dispute that the land in issue generally belongs to Naroosura Group Ranch. It has not yet been subdivided. The land is therefore governed by the Land Group (Representative) Act Cap. 287, Laws of Kenya. The question is therefore whether the applicants are properly before the court. Under Section 5 of the Act, a meeting of the Group, convened by the Registrar after due notice, elects its representatives. Under Section 7, the said representatives who then apply for incorporation and under Section 8, the certificate of incorporation confers on the representatives power to sue and be sued in the corporate name, acquire, hold or charge and dispose of property of any kind and borrow money with or without security. Section 9 then provides for change in the Group representatives. In the event of disputes, Section 10 allows the Registrar to intervene or the same be adjudicated upon by the District Magistrate’s Court. It seems that there are disputes in the Group Ranch over leadership and ownership or use of land as admitted by the applicants in the further affidavit at paragraphs 9 to 14. That being the case, the applicants should first exhaust the dispute resolution mechanism under the Act (Section 10) before they can venture to come to this court. Besides, it is clear from Section 5 and 7 that the applicants have no locus to bring this application as they are not Group representatives recognized under Section 8 of the Act. The Group Ranch is still in existence and the applicants must comply with Chapter 287, Laws of Kenya, and Rules of the Group to which the Group is subject.....Apart from the applicants lacking the necessary locus standi to bring this suit, this application offends provisions of the Group Ranch Representatives Act. I do uphold the objection based on the preliminary objection filed by the Respondent and the application dated 28/7/2010 is hereby dismissed with the applicants bearing the costs.”

The propriety or otherwise of the suit herein?

26. As pointed out above, the plaintiff’s case is challenged on among other grounds, the ground that **Order 37 Rule 8** ousts the jurisdiction of this court to entertain a claim for cancellation of title registered under the Registered Land Act.

Order 37 Rule 8 aforesaid provides as follows:

“An application under the Registered Land Act (Cap 300) other than under sections 120, 128, 133, 143 and 150 thereof shall be made by originating summons unless there is a suit pending involving the same land when the may be made in the suit.”

27. The rationale for the above provision of the law was stated by **Angote J.**, in the case of **Cyril J Haroo 7 Another v. Uchumi Services Ltd & 3 Others (2014) e KLR** thus:

“The simple explanation for this provision of the law is that a title can only be cancelled by the court after evidence has been tendered to show that the same was procured fraudulently, or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross-examination of the people involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions...It therefore follows that cancellation of a title deed or a Certificate of Lease is not a simple issue which can be decided by way of an originating summons thus the provisions of Order 37 Rule 8....”

28. In reaching the above determination, the judge found refuge in, among other cases the case of **Kibutiri Vs Kibutiri (1983) KLR** where it was observed:

“The scope of an inquiry which could be made on an Originating Summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raise complex and contentious questions of facts and law, a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit.”

29. In the case of **Malindi Musketeers Limited v. Attorney General & 2 others (2014) eKLR**, the same judge (**Angote J**) observed: **“...In the case of Ngomeni Swimmers Limited Vs The Commissioner of Lands and 25 Others; Malindi HCCC No. 18 of 2013 (OS), I held as follows;**

“14. Order 37 Rule 8 of the Civil Procedure Rules, 2010 provides that Applications under the Registered Land Act shall be made by way of an Originating Summons except under section 120, 128, 133, 143 and 150 of the Act. Section 143 of the repealed Registered Lands Act, Cap 300 is the only section that gives the court the mandate to rectify the register by directing that any registration be cancelled or amended once it is satisfied that the registration was made or omitted by fraud or mistake. In view of the fact that Order 37 Rule 8 of the Civil Procedure Rules, 2010 expressly prohibits the filing of an Originating Summons in respect to claims brought pursuant to the provisions of section 143 of the repealed Registered Land Act, this court cannot grant the declaratory orders that are being sought by the Plaintiff by way of an Originating Summons.

15. That is the same scenario that the Plaintiff in this matter finds itself in. In view of the clear provisions of Order 37 Rule 8 of the Civil Procedure Rules as read together with the provisions of Section 143 of the Registered Land Act, Cap 300 (repealed), this court cannot order for the rectification of title by cancellation by way of an Originating Summons. The Plaintiff should have commenced his suit by way of a Plaint and not an Originating Summons.

16. In the case of THEURI VS LAW SOCIETY OF KENYA (1988) KLR 334, the Court of Appeal declined to grant to the Applicant interlocutory relief because the appellant did not file a Plaint as envisaged under the then Order XXXIX of the Civil Procedure Rules. The Court of Appeal found that there was no competent action on which the Appellant could base his claim for the grant of interim reliefs.

17. In the case of Wakf Commissioner Vs Mohamed bin Umeya bin Abdulmaji Bin Mwijabu (1984) KLR 346, the Court of Appeal held that an Originating Summons is intended for settling simple matters without the expense of a full trial and not for serious issues. The issues raised by the Plaintiff and the Interested Parties in this matter are complex issues which can only be dealt with by way of a Plaint and after the full hearing of evidence. A declaratory order for the cancellation of a title deed cannot be said to be a simple issue which can be decided by way of an Originating Summons.

18. The suit as currently instituted is in contra-statute and a nullity *ab initio*. In the circumstance, I shall, which I hereby do, allow the 3rd Defendant's Preliminary Objection dated 31st May 2013 and strike out with costs the Originating Summons dated 5th December, 2011 together with the Notice Motion dated 13th May, 2013."

30. Being of the view that the judge properly directed herself on the question, I adopt his reasoning in the cases of **Cyril J Haroo 7 Another v. Uchumi Services Ltd & 3 Others and Malindi Musketeers Limited v. Attorney General & 2 others** (*supra*) in finding that the suit herein is bad in law for not only having been brought by persons without *locus standi* to institute it under the Land (Group Representatives) Act but also offending the provisions of **Order 37 Rule 8** of the Civil Procedure Rules.

31. As the above determination suffices to determine the issues framed for the court's determination, I will not venture into the other issues or address the merits in the applications dated 24th April, 2016 and 28th June, 2016.

32. The upshot of the foregoing is that the preliminary objection is sustained and the Originating summons dated **25th April, 2016** is struck out with costs to the respondents.

Dated, signed and delivered in Nyeri on this 18th day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kingori h/b for Mr. Karweru for the plaintiff

Mr. Karanja for the 2nd – 48th defendants and h/b for Mr. Githui for the 88th defendants and

Mr. Khaenga for the 1st defendant N/A for the Attorney General

Court clerk - Esther