



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.98 OF 2013

DANIEL K. YEGO.....1ST PLAINTIFF

PHILEMON K. LANGAT.....2ND PLAINTIFF

DANIEL K. MITEI T/A AINOPTICH

BOREHOLE WATER PROJECT.....3RD PLAINTIFF

KALENJIN ENTERPRISES LTD.....4TH DEFENDANT

VERSUS

PAULINA NEKESA KODE.....DEFENDANT

JUDGMENT

(Suit filed on behalf of a Self Help Group; Self Help Group having more than 100 members; argument that the group is an unlawful society and litigation cannot be commenced for its benefit; Societies Act requiring any group or association of 10 or more persons to be registered or to be exempt from registration; entity not registered held to be an unlawful society; these being provisions of the law which need to be abided by; Self Help Group in this instance qualifying as an unlawful society; against public policy for a suit by such entity to be entertained; 4th plaintiff a limited liability company disowning the case; suit dismissed with costs).

1. The original plaint in this matter was filed on 2 July 2004. The plaintiffs described themselves as Committee members of the Ainoptich Borehole Water Project, holding the positions of Chairman, Secretary and Treasurer. They sued the defendant on the claim that the defendant illegally subdivided the land parcel Miti Mingi/Mbaruk Block 3/4123 (land parcel No. 4123) into the land parcel Miti Mingi /Mbaruk Block 3/5057 (land parcel No. 5057) using an award of the Land Disputes Tribunal that the plaintiffs claimed was never adopted by the court. The defendant filed defence where she inter alia admitted having subdivided the land parcel No. 4123 into two portions one of which is the land parcel No. 5057 and which she registered in her name. She however denied that this was as a result of an invalid court decree.

2. It will be discerned at this point, that the plaintiffs premised their suit on the assertion that the defendant proceeded to subdivide the land parcel No. 4123 on an award of the Land Disputes Tribunal that was never adopted by court. That award was filed in the Chief Magistrate's Court at Nakuru in the Land Dispute Case No. 46 of 2002. There was an appeal filed to the Provincial Appeals Committee

against that award. At the time the decision of the Provincial Appeals Committee was made, the defendant had already subdivided the land parcel No. 4123 into the parcel Numbers 5056 and 5057. The contention of the plaintiffs was that the original land parcel No. 4123 housed the Borehole Project which to them is a public utility meant to provide water to members of the public. The defendant of course claimed the same land as her own. The Provincial Appeals Committee in its decision, held that the Ainoptich Water Project should remain in the land parcel No. 5056 because that is where the borehole, the power house, water trap and water tank were situated. The Committee further decided that the defendant can retain the land parcel No. 5057 but not interfere with the piping network that was underground and which moved water from the water project in the land parcel No. 5056.

3. There was a further appeal to the High Court against this decision. The High Court held that both the Land Disputes Tribunal and the Appeals Committee had no jurisdiction to decide the dispute. The award and the decision of the Appeals Committee were therefore nullified.

4. The above necessitated amendments to the pleadings of the parties so that the whole dispute over the ownership of the land in issue may be heard, disregarding entirely the decision of the Land Disputes Tribunal and of the Appeals Committee. There had been earlier amendments to the plaint but the final amendment is contained in the Further Further Amended Plaint filed on 2 February 2015 which now comprises the dispute presented by the plaintiffs. Apart from the Ainoptich Borehole Water Project, suing through three officials who were named as the 1st - 3rd plaintiffs, Kalenjin Enterprises Limited was also enjoined to the suit as the 4th plaintiff. The defendant remained Paulina Nekesa Kode.

5. It was now pleaded that the 4th plaintiff did allocate to Ainoptich Water Project the land parcel No. 4123. It was pleaded that the water project serves more than 20,000 people and over 70,000 animals within Barut Location and has existed since 1999. It was pleaded that at no time was the defendant ever a member of the 4th plaintiff and never held shares in the company and that her dealings over the land parcel No. 4123 can only be termed as fraudulent. It was pleaded that the defendant took over and subdivided this land parcel No. 4123 to create the land parcels No. 5056 and 5057 following a decision that was quashed by the High Court. In the suit, the plaintiffs have asked for the following orders :-

(a) A declaration that the defendant has never been and is not a member of the 4th plaintiff and is not entitled to any of its property.

(b) The registration of the defendant as the proprietor of the land parcels Miti Mingi/Mbaruk Block 3/ 5056 and 5057 (and subsequently issued titles) be cancelled.

(c) Flowing from prayer (b) above, the original title Miti Mingi/Mbaruk Block 3/4123 be restored and the same be registered and title issued in the name of the 1st - 3rd plaintiffs to hold in trust for the members of Ainoptich Water Borehole Project.

(d) An order to evict the defendant from parcel No. Miti Mingi / Mbaruk Block 3/ 5057.

(e) Costs and interest.

6. I have not seen an amended statement of defence to this plaint, and I assume that the defendant stands by the amended defence filed on 1 July 2010, vide which she asserted that the land parcel No. 4123 was lawfully and properly allocated to her by the 4th plaintiff in satisfaction of the shares that she held with the 4th plaintiff.

B. EVIDENCE OF THE PARTIES

7. PW-1 was Daniel Kiptoo Yego, the Chairman of the Ainoptich Borehole Water Project (Ainoptich BWP). He testified that they were given the plot by the 4th plaintiff, then known as Rift Valley Enterprises Company. Initially they were given the plot number 1770 in the year 1977 which plot was subdivided into two on 29 October 1989. One of the subdivisions was the plot No. 4123, the other being plot No. 4122. A transfer for the parcel No. 4123 was drawn on 19 July 2000. However when he went to

collect the title deed, it was discovered that the same land had a title issued in favour of the defendant. They wrote a letter seeking to have the title returned and also reported to the Criminal Investigations Department (CID). The defendant insisted that she owns the plot. The dispute then went to the Land Disputes Tribunal and later the land parcel No. 4123 was subdivided into the land parcels No. 5056 and 5057.

8. He testified that the defendant did not pass through Kalenjin Enterprises Ltd to get her title but was given the land by persons who purported to be directors, but were not, namely Maina, Zakayo and Nyanducha who were styled the "Nyamakoroto Group". Of the 4th plaintiff company.

9. In cross-examination, PW-1 testified that they were given the land through a letter dated 21 May 2000 which was written by one Mr. Ngeno as Secretary/Director and signed by a Mr. Chelaite who was one of the directors of the 4th defendant. He testified that the transfer instrument in favour of the plaintiff was not signed as it was discovered that the title is held by someone else. The transferor in the instrument was Peter Yego who held the position of Chairman.

10. He testified that there were fake Share Certificates that had been issued purporting to be from the office of the 4th plaintiff and that the one displayed by the defendant was among the fake ones. He stated that the defendant was not a member of the 4th defendant. He testified that there had been a tug in the 4th plaintiff company but the genuine directors were only those confirmed by the Registrar of Companies. He testified that the defendant got her title to the land parcel No. 4123 two days before they went to register their transfer. He stated that this title was obtained through the Nyamakoroto group of directors who were not the proper directors of the company. He however did not have a document from the Registrar of Companies showing who the true directors were.

11. PW-2 was Elijah Kiplagat Kipkemei Chelaite. He testified that he is one of the founder members of the 4th plaintiff in 1969 and is a director. He stated that he became Chairman of the 4th plaintiff in the year 2008. He testified that shareholding in the 4th plaintiff company closed in the year 1975. He testified that the land parcel No. 4123 was set aside to be used as public utility. He testified that the company does not recognize the defendant and that the defendant is not a shareholder of the 4th plaintiff. They however have a shareholder by the name of Paulina Eli Ibrahim who was allocated the plot Miti Mingi/ Mbaruk Block 3/ 100 (Barut) and that person is not the defendant. He testified that between the years 1980 and 1985, Kalenjin Enterprises was infiltrated by swindlers and about 6000 fake share certificates were issued. This led to a taskforce being created to investigate. He testified that the share certificate held by the defendant is fake. He stated that one Zakayo Sitonik signed many blank certificates but the Secretary inserted the names of people who were not members. He testified that one only got a title deed after receiving a clearance certificate. He testified that the clearance certificate held by the defendant was fake.

12. In cross-examination, he stated that he came to court as a witness of the Water Project and that no resolution was passed to enjoin Kalenjin Enterprises to this suit. He stated that he signed the letter dated 21 May 2000. He was aware of the use of the title "Obot" in Kalenjin language which means "mother of" and thus Paulina Obot Kimunai would mean "Paulina mother of Kimunai". He stated that the share certificate held by the defendant was signed by one of their directors but that the same is not genuine because the name of the defendant does not appear in their register. He stated that the company has 4, 413 members but denied that the defendant was member number 4052. He testified that one of the signatures in the defendant's clearance certificate is of Maina Kirungui who together with other persons based at Nyamakoroto House, purported to be directors. He testified that they were directors in the year 1997 but were removed in the year 1999. He stated that if the defendant's documents are genuine they are ready to give her alternative land.

13. With the above evidence, the plaintiffs closed their case.

14. The defendant testified as the sole witness. She stated that she is also known as Paulina Obot Kimunai. She said she has a son called Kimunai. Her Identity Card showed the names Paulina Neshesha Koda. She testified that she is a member of Kalenjin Enterprises and produced what she said was her membership card which read the names Paulina Obot Kimunai. She also produced a Share Certificate

bearing the names Paulina Kobot Kimunai and a Clearance Certificate which she said she was issued to her by the company. The Clearance Certificate is in the name of Paulina Neshesa Koda. She testified that she claims the land in accordance with her shares and holds a title deed to the parcel No. 4123 which she produced. She testified that there was a meeting held which resolved that her land should be taken away but this meeting according to her was not held by the directors. She stated that she should be allowed to keep her land.

15. In cross-examination, she stated that she was given the land by one Kabon and not Chelaite. She was given the land by the directorship of arap Menjo, arap Kelong, arap Tuimising and Zakayo Sitonik. She stated that it was Sitonik who stamped on her Certificate. These, according to her, were not the Nyamakoroto Group but the proper directors. She did not respond when put to her that the proper directors were Chelaite and others. She testified that she does not know Paulina Eli Ibrahim but only one Paulina Obot Muzee who was from Maralal. She stated that it was Zakayo Sitonik who showed her the land.

16. In re-examination, she testified that when she was given the land, the group of Chelaite were not directors.

17. With the above evidence, the defendant closed her case.

C. SUBMISSIONS OF COUNSEL

18. I invited counsels to put in written submissions and they both did.

19. Counsels for the plaintiff, Mr. Cheruiyot, submitted inter alia that the defendant's title was acquired fraudulently. It was submitted that the evidence of PW-2 showed that the defendant was never a member of Kalenjin Enterprises. Counsel submitted that Zakayo Sitonik who was one of the directors of the Nyamakoroto Group, had no capacity to transfer the suit land to the defendant. It was submitted that the defendant fraudulently misrepresented herself as Paulina Obot Muzee who counsel submitted was a bona fide member. He submitted that the defendant has not discharged the burden of proving how she came to legally acquire the title to the parcel No. 4123. He submitted that the burden of proof was upon her in accordance with Sections 112 and 116 of the Evidence Act (Cap 80) Laws of Kenya. He relied on the case of *Munyua Maina vs Hiram Gathiha Maina (2013) eKLR* as authority that dangling a title was not enough for the defendant and that she has not ably demonstrated how she acquired it. He also relied on the cases of *Epaphrus Muturi Kigoro vs William Mukui Nyaga (2015) eKLR*; *Mutete Ndonye vs Muli Munyao & 4 Others (2012) eKLR*; and *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri, Civil Appeal No. 6, 26 & 27 of 2011*. The first three cases relied on by counsel are cases where titles which were found to have been procured fraudulently were cancelled. The last case is a case that concerned the provisions of the Land Control Board, and I have not really seen its relevance here.

20. On the other hand, Mr. Okeke for the defendant, first questioned the capacity of the plaintiffs to institute this suit. He submitted that the 1st, 2nd and 3rd plaintiffs are suing as officials of a body known as Ainoptich Borehole Water Project and yet they have produced a certificate of registration of a Self Help Group issued by the Ministry of Gender, Children & Social Development dated 6 May 2004. He submitted that PW- 2 testified that no resolution was passed to commence suit on behalf of the 4th plaintiff. He submitted that for Ainoptich Borehole Water Project to be legally in existence, it had to be registered or exempted from registration under Section 10 of the Societies Act as it has hundreds of members according to the evidence tendered. He submitted that Ainoptich Borehole Water Project is an unlawful Society under Section 4 of the statute and that such unlawful society cannot sustain legal proceedings in any court of law. He relied on the cases of *Dennis Oloigo & 2 Others vs Art of Ventures Ltd & 2 Others, Nairobi HCCC No. 158 of 2005 (2006) eKLR*; and *Nakuru County Maasai Elders Community Based Organization & 7 Others vs Maenga Kisotu & Others, Nakuru HCCC No. 106 of 2013*. He submitted that the suit by the 1st, 2nd and 3rd plaintiffs is incompetent and legally unsustainable and ought to be struck out with costs.

21. He submitted that no valid allocation of land could be done to the plaintiffs through the letter of 21st

May 2000. He submitted that the letter was written 4 years prior to the Ainoptich Water Project being issued with its Certificate which is dated 6 May 2004 and no resolution was passed prior to the letter being issued. He submitted that the conclusion is that at no time did the 4th defendant allocate the suit property to the 1st, 2nd and 3rd plaintiffs.

22. On the issue whether the defendant was a member of the 4th plaintiff, he submitted that no register of members was ever produced by the plaintiffs. He pointed out that what was produced was a list of members of Ainoptich Water Project, not Kalenjin Enterprises. He submitted that the defendant produced evidence showing that she is a member of the 4th plaintiff, being, her shareholder certificate, certificate of ordinary shares and clearance certificate for issuance of title deed. He submitted that the burden of proving whether or not the defendant was a member lay with the plaintiffs. He submitted that they could have discharged this burden by producing records from the Registrar of Companies indicating who the genuine directors of the company were but they failed to do so. He distinguished the authorities tendered by the counsel for the plaintiff, as in his view, no fraud was proved in this case. He closed his submissions by stating that the defendant's clearance certificate shows 1.8 acres but that her title shows 2.1 acres. He submitted that the defendant does not wish to be given more land than her shareholding and is ready to surrender the extra 0.3 acres in her title to the 4th plaintiff.

23. With the above submissions, I retired to write the judgment and gave a date for its delivery. However, upon going through the submissions of counsel for the defendant, I felt that a weighty point of law, on the capacity of Self Help Groups to bring suits, had been raised yet not addressed at all by the plaintiff. I did not therefore deliver the judgment on the first appointed date, but I thought it fit to allow counsel for the plaintiff to file a response to the defendant's counsel submissions on this point. In the response, counsel (now Ms. Njoroge) acknowledged that a Self Help Group has no legal capacity and cannot therefore sustain a suit. It was however argued that this does not mean that members of a Self Help Group do not have a platform or any form of redress by the mere lack of registration. I was referred to Article 22 of the Constitution which allows any person to bring proceedings claiming a violation of the rights in the Bill of Rights. I was also referred to Article 260 of the Constitution which defines "person" as "including a company, association or other body of persons whether incorporated or unincorporated." I was referred to the case of ***Kipsiwo Community Self Help Group vs Attorney General & 6 Others (2013) Eklr***; ***Kirinyaga Bar Owners Organization vs County Secretary of Kirinyaga County Government & 6 Others (2014) Eklr***; and ***Football Kenya Federation vs Kenyan Premier League Limited & 4 Others (2015) Eklr***. It was submitted that the first three plaintiffs filed the suit as members of, or in the interest of Ainoptich Borehole Water Project, and have legal capacity to maintain the proceedings. On the argument that there was no resolution passed by the 4th plaintiff prior to the institution of the suit, counsel referred me to the case of ***Fubeco China Fushun vs Naiposha Company Ltd & 11 Others (2014) Eklr***.

D. DECISION

24. I have considered the pleadings, the evidence and the submissions of the parties. To me, the following issues are open for determination :-

- (i) Whether this suit is maintainable by the plaintiffs.
- (ii) Whether the defendant is a member of the 4th plaintiff.
- (iii) Whether the 4th plaintiff allocated the suit property to the 4th defendant or to the Ainoptich Water Project.
- (iii) Whether the title of the defendant was fraudulently acquired and is subject to be cancelled.
- (iv) Whether the plaintiffs are entitled to the prayers sought.

Issue 1 : Whether this suit is maintainable by the plaintiffs.

25. In the further further amended plaint, which is the basis of this suit, four plaintiffs are identified. The

first three plaintiffs are Daniel K. Yego, Philemon K. Langat, and Daniel K. Mitei. The title of the case shows the three T/A (which usually means "trading as") Ainoptich Borehole Water Project. The 4th plaintiff is a limited liability company. Paragraph 3 of the plaint is drawn as follows :-

"The plaintiffs 1st, 2nd and 3rd herein are Committee Members of Ainoptich Borehole Water Project-Barut holding the Office of Chairman, Assistant Secretary and Treasurer respectively."

26. There is clearly some element of inelegant pleading in the manner in which the title of the case and paragraph 3 are drawn. In the title of the case, the first three plaintiffs are described with the words "trading as", but in paragraph 3 of the plaint, they are described as office holders. It is apparent that the first three plaintiffs cannot be "trading as" for the three of them are not jointly operating some sort of unincorporated business. They are to me officials of a Group. I also have to assume that the description Ainoptich Borehole Water Project- Barut in the plaint, is in reference to Ainoptich Water Project (Mogoon) which was registered as a Self Help Group by the Ministry of Gender, Children & Social Development on 6 May 2004 pursuant to the Certificate of Registration produced by the plaintiffs as an exhibit. The number of group members from what I can see, in a form titled "Renewal", issued in the year 2012 by the Ministry of Gender, Children and Social Development, is 265, and there was a list of 151 persons that was attached, which I presume, is the list of members of this Self Help Group.

27. It will be observed that Mr. Okeke in his submissions did submit that this was an illegal group which cannot sustain legal proceedings. I have looked at the Societies Act, Cap 108, Laws of Kenya, and I think Sections 2, 4, 9 and 10 are material. Section 2 defines a Society and provides for an "unlawful society". The same prescribes as follows :-

“society” includes any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not, except in paragraphs (i) and (ii) of [section 11\(2\)\(f\)](#) of this Act, include—

(a) a company as defined by the Companies Act ([Cap. 486](#)), or a company registered as a foreign company under Part X of that Act;

(b) any corporation incorporated by or under any other written law;

(c) a registered trade union within the meaning of the Trade Unions Act ([Cap. 233](#)), including a branch of a trade union registered under that Act, a probationary trade union within the meaning of that Act and a trade union or a branch of a trade union whose application for registration has been made and not determined;

(d) a company, firm, association or partnership consisting of not more than twenty persons, formed and maintained with a view to carrying on business for profit;

(e) a co-operative society registered as such under any written law;

(f) a school registered under the Education Act ([Cap. 211](#)), Advisory Council, Board of Governors, District Education Board, School Committee or similar organization established under and in accordance with the provisions of any written law relating to education;

(g) a building society as defined by the Building Societies Act ([Cap. 489](#));

(h) a bank licensed under the Banking Act ([Cap. 488](#));

(i) any international organization of which Kenya is a member, or any branch, section or organ of any such organization;

(j) any combination or association which the Minister may, by order, declare not to be a society for

the purposes of this Act;

28. According to the same section, “**unlawful society**” has the meaning assigned to that expression in [section 4\(1\)](#) of the Act. The whole of Section 4 provides as follows :-

Unlawful societies

(1) Every society which is not a registered society or an exempted society is an unlawful society:

Provided that a society shall not be an unlawful society where, within twenty-eight days of its formation, it has applied for registration or for exemption from registration under [section 9](#) of this Act and it has not been notified of the determination of its application, unless—

(i) it is formed for an unlawful purpose; or

(ii) the Minister has declared it, by order, to be a society dangerous to the good government of the Republic; or

(iii) the Registrar has notified the society (whether or not before the making of the application) that he intends to refuse registration or exemption from registration on one of the grounds specified in [section 11\(1\)\(b\)](#) of this Act.

(2) The Registrar shall consider every application for registration of a society or for exemption from registration and shall communicate his decision thereon to the society within one hundred and twenty days of receipt of the application.

(3) Where a society which is not a registered society or an exempted society has applied for registration or exemption from registration, and is saved by the proviso to subsection (1) of this section from becoming an unlawful society, no person shall, except with the written permission of the Registrar, collect or invite subscriptions or donations to the funds of the society or in any other way whatever organise or take part in any activity of or on behalf of the society, except only to apply to or correspond with the Registrar.

(4) Any person who contravenes subsection (2) of this section shall be guilty of an offence and be liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

Part III of the Societies Act, provides for the manner of registration and I think Sections 9 and 10 are material. They are drawn as follows :-

9. Society to apply for registration or exemption

Every society shall, in the prescribed manner and within twenty-eight days after the formation thereof, make application to the Registrar for registration or for exemption from registration under this Act.

10. Manner of effecting registration or exemption from registration

(1) Upon application being made in the prescribed manner for registration of a society, the Registrar shall, subject to this Act, register the society by entering in the register of societies, kept for the purpose, the prescribed particulars and the date of the entry.

(2) Upon application being made in the prescribed manner for exemption of a society from registration, the Registrar may, with the approval of the Minister, so exempt the society, and if he does not so exempt the society he shall treat the application as an application for registration and shall, subject to the provisions of this Act, register the society.

(3) Upon registering a society or exempting it from registration, the Registrar shall issue to the society a certificate of registration or exemption from registration in the prescribed form.

29. My interpretation of the above Sections is that the law in Kenya contemplates that where a group of 10 or more persons want to come together as a group with a set object or purpose, then they need to register a Society, or apply to be exempted from registration. The alternative is for this group to form themselves into a trade union, a company, firm association or partnership, a co-operative society, a school, a building society, a bank, an international organization, or a Non-Governmental Organization, of course depending on the objects and purpose that the group intends to fulfill. The law actually forbids the formulation of groups outside these identifiable units. Where such group is not registered, as prescribed in the Societies Act, then Section 4 of the statute provides that such group is an unlawful society. The statute goes further to prescribe that it is an offence to fail to register a group as a Society or apply for its exemption.

30. It is also an offence to manage an unlawful society or to be a member of such society. This is prescribed in Sections 5 and 6 of the Societies Act which provides as follows :-

5. Managing unlawful society

Any person who manages or assists in the management of an unlawful society shall be guilty of an offence and be liable to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand shillings, or to both such imprisonment and such fine.

6. Being member of unlawful society

Any person who, knowing or having reasonable cause to believe a society to be an unlawful society

(a) is a member, or attends any meeting, of that society; or

(b) allows a meeting of that society, or of any members of that society, to be held in any house, building or place belonging to or occupied by him, or over which he has control,

shall be guilty of an offence and be liable to imprisonment for a term not exceeding one year or to a fine not exceeding five thousand shillings, or to both such imprisonment and such fine.

31. The above is the law as it currently exists. The Societies Act, it will be seen, does not contemplate Self Help Groups and does not mention them anywhere. Persons have however continued to mobilize themselves into Self Help Groups and a Ministry of the Government has been issuing registration certificates to them. Their purpose may be well intended, mostly to assist persons to come together for the purposes of community development. The intentions are no doubt noble, but it is apparent that there is a lacuna regarding their registration and legal status which has never been filled.

32. The first three plaintiffs do not pretend that Ainoptich Water Project is a registered society. It is actually not. But what it has is a Certificate stating that it is Self Help Group. Now a Self Help Group is certainly a collection of people, who if ten or more, then require to be registered as a Society or under any other appropriate statute. I have not come across any law that allows for the registration of Self Help Groups that may be outside the ambit of the Societies Act and none has been shown to me. Probably in order to cure this legal void, there is now a proposed law, still in Bill form, styled The Self-Help Associations Bill, 2015. The Bill aims to *"provide for the registration of self-help associations; to provide an administrative and regulatory framework within which self-help associations can conduct their affairs and for connected purposes"*. This is in the introduction part of the Bill. The fact that there is such a proposed law, signals an acknowledgement that self-help groups have actually no recognition in the law. To date, the proposed Bill has not yet been passed and I am not privy to its intrigues. Suffice to state that the current law remains that prescribed in the Societies Act and it has to be followed and applied however inconvenient.

33. It follows that any group, and that includes the so-called Self Help Groups, which are of ten or more persons, and which are not registered under the Societies Act, or registered as other recognized units under any other statute, are unlawful groups. You cannot give legal personality to an unlawful group and one cannot be allowed to represent and agitate for rights on behalf of an unlawful group. It is in fact an offence under the Societies Act to do so, as I have pointed out above. It is time to call a spade a spade; I am afraid that these groups, which are of ten or more persons, are unlawful, and unless and until an appropriate law for their legal recognition, outside the framework of the Societies Act is provided, they will remain unlawful associations.

34. My holding above is not new. That was the position taken in the two authorities presented to me by Mr. Okeke. In the case of ***Dennis Olooligero & 2 Others vs The Art of Ventures Ltd & 2 Others, Nairobi High Court Civil Case No. 1358 of 2005***, by Aluoch J, and by Omondi J, in the case of Nakuru County ***Masaai Elders & Others vs Maenga Kisotu & Others , Nakuru High Court, Civil Case No. 106 of 2013***. I concur with the findings in the two cases.

35. In our case, the Ainoptich Water Project has more than 100 members. It is an unlawful group unless they register themselves under the Societies Act, or other legal regime appropriate to their circumstances. I regret that I am unable to entertain proceedings filed on behalf of a group that has by law been declared unlawful, which proceeding is not aimed at contesting any declaration of illegality, for I will be perpetuating an illegality.

36. Counsel for the plaintiffs argued that the Self Help Group in our case can file suit through persons with legal capacity. I do not think that issue is in contest. Individuals with legal capacity can very well file a suit on behalf of a Self Help Group. That was indeed the holding in the case of ***Kipsiwo Self Help Group vs AG*** which is a case that was commenced by an entity describing itself as Kipsiwo Self Help Group in its own name. The case was dismissed for the reason that Kipsiwo Self Help Group had no legal capacity to file proceedings on its own but it was held that persons clothed with legal personality could file proceedings on behalf of the Self Help Group. However, the question here is not whether such a group has legal personality, or whether a group without legal personality can sue through the agency of persons with legal capacity. The question is whether a court should allow individuals to file a suit on behalf of an entity that has been declared unlawful by law. I think it would be against public policy and a perpetuation of an illegality, for courts to entertain proceedings filed on behalf of an illegal entity, unless the suit is aimed at challenging the very declaration of illegality.

37. That said, there would be no bar in the first three plaintiffs presenting a suit on their own behalf. That they can do. In our case however, the plaintiffs have not pleaded that they have brought this suit in any respect, on their own behalf. If they had, I would have entertained these proceedings as proceedings brought in their own capacity. I cannot assume that they have brought the suit in their own capacity for there is nothing to point me to that. I do not wish to impose on them a capacity and context that they do not wish to be part of. There would also have been no bar, if the suit was filed on behalf of others. For this to apply, the plaintiffs would have needed to file a representative suit as provided for under Order 1 Rule 8 of the Civil Procedure Rules, 2010. The same is drawn as follows :-

8. One person may sue or defend on behalf of all in same interest [Order 1, rule 8.]

(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 subrule (1) may apply to the court to be made a party to such suit.*

38. It will be seen from the above that a person can commence proceedings on behalf of others who have the same interest. But in such case, the person needs to give notice of the suit to the other interested persons either by way of personal service or through advertisement as may be directed by court. The case herein does not pretend to be one under Order 1 Rule 8.

39. The other alternative is for all the persons interested in the litigation to be named as plaintiffs in their individual capacity. In this instance, Order 1 Rule 13 of the Civil Procedure Rules would apply. It is drawn as follows :-

13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]

(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.

40. For purposes of our case, if the above were to apply, it would mean that all the persons who are thought to be members of the Ainoptich Self Help Group, be named as plaintiffs. They would then give authority to the 3 plaintiffs to authorize the filing of documents, swearing of affidavits and generally conducting the litigation on their behalf. Again, this suit does not pretend that it is one where there are several persons but who have authorized the first three plaintiffs to sue.

41. Neither can I assume that the first three plaintiffs have ostensible authority, granted by members of the Self Help Group to institute this suit on their behalf for the plaintiffs never produced the Constitution of the Self Help Group or any document that would infer such agency.

42. Whichever way I look at it, the first three plaintiffs cannot maintain this suit in the capacity in which they have approached the court. The issue would probably have been different if they had pleaded that they have also filed the case in their own individual capacities. They have not. It is clear that they filed suit on behalf of an entity that is unlawful. Neither is the suit herein is a representative suit.

43. The first three plaintiffs are therefore not proper parties and not being proper parties, their suit is hereby struck out.

44. That leaves the 4th plaintiff. There is no doubt about the capacity of the 4th plaintiff to file suit. It is a limited liability company. It has legal personality and can sue and be sued in its own name. The only problem is that PW-2 the director of the 4th plaintiff, testified that the 4th plaintiff has not authorized the filing of this suit. In fact, as far as he was concerned, he was only coming to give evidence on behalf of Ainoptich Water Project and not on behalf of the company. Clearly, the company, having not intended to be parties to this suit, cannot now be said to be plaintiffs.

45. The issue here, in my view, is different from that which the court faced in the case of ***Fubeco China Fushun vs Naiposha Ltd & Others***. In the said case, there had been argument raised that there was no resolution displayed to commence suit. The suit itself had been commenced by a Director of the company. The court held that a Director has authority to commence suit and unless there was a challenge from the company itself that the person who had commenced suit had no authority to do so, it was not the place of the other party to raise the issue. But this is not the situation at hand. PW-2 a director of the 4th plaintiff, was categorical that the company has not given any authority that they be parties to this suit. I already mentioned that he stated that he came to testify, not on behalf of the company, but on behalf of the Ainoptich Water Project. The only conclusion that one can reach is that there is no suit filed by Kalenjin Enterprises Ltd. It follows that Kalenjin Enterprises Ltd cannot be considered as plaintiffs in this case.

46. Having held that the first three plaintiffs could not file suit in the capacity mentioned, and having held that the 4th plaintiff is not a plaintiff in this case, there is really no suit before me and it will be unwise for me to proceed to make any determinations touching on the merits or otherwise of this case. This may prejudice any findings in future lest another suit is filed. For that reason, I decline to determine the other issues in the suit.

47. The end result is that this suit is dismissed with costs. For the avoidance of doubt, I have not determined the merits of the suit and I have not made any determination on whether or not the defendant is entitled to hold the proprietorship of the land parcel Miti Mingi/Mbaruk Block 3/ 4123 or the resultant subdivisions (if they have still been maintained) being Miti Mingi/Mbaruk Block 3/5056 and 5057.

48. The first three plaintiffs shall bear the costs of this suit jointly and/or severally.

49. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of July, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -