



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.136 OF 2015**

**MORRIS SULUBU HARE.....PLAINTIFF**

**=VERUS=**

**1. ANDERSON MOLE MUNYAYA**

**2. ISAAC JILO ONOTO**

**3. DANIEL KITSAO BAYA**

**4. MJANAHERI SELF HELP WATER PROJECT.....DEFENDANT**

**RULING**

1. What is before me is the Application by the Defendants dated 18<sup>th</sup> March, 2016 in which they are seeking for the following orders:-

**(a) The Plaintiff's suit is struck out for failure to obtain leave of court to sue, and continue the suit against the defendants as officials and representative of the 4<sup>th</sup> Defendant, an unincorporated group, as required by the rules of court (Order 1 rule 8 and Msa H.C.C.No.58 of 1996 Awadh Osman & 2 others V Job Omino & 2 others, ruling of Waki J of 16.2.1996 and J. J. Campso & D Cruz V. A. C. Desesauza & 5 others 1933 EACA86);**

**(b) In the alternative the suit is struck out or stayed with costs to the defendants, for want of jurisdiction, as the boundaries of the various plots mentioned in the pleadings herein have not been fixed as required under the law (Section 18 of the Land Registration Act) and Article 159 of the Constitution is of no avail to the Plaintiff, as the matters complained of go to jurisdiction of court and competence of proceedings;**

**(c) The costs of this application and of the main suit are provided for.**

**The 1<sup>st</sup> Defendant/Applicant deponed that:-**

2. In response, to the Application, the Plaintiff deponed that the Applicants are attempting to put roadblocks to the hearing and determination of the substantive issues; that the suit is against the Defendants both in their individual and official capacities or in both capacities and that in any event, a suit cannot be defeated by reason of misjoinder and/or non joinder of parties.

3. It is the Plaintiff's/Respondent's case that the 4<sup>th</sup> Defendant is registered under the department of Social Services and the Societies Act and that Section 18 of the Registered Land Act is inapplicable.
4. According to the Plaintiff, the boundaries herein are fixed because the survey report refers to a map, R.I.M sheet No. 10 and that it is far fetched for the Defendants to state that this court does not have jurisdiction.
5. The Plaintiff has deponed that the Defendants have specifically pleaded in their Defence that parcel of land number Ngomeni Squatters Settlement Scheme/1295 does not border plot 2011; that there is therefore no boundary dispute between the two parcels of land and that whether the boundaries are fixed or not is irrelevant.
6. The Defendants' advocate submitted that an action cannot be brought before the ELC if it touches on a boundary or boundaries, before such boundaries are fixed; that there is nothing in the pleadings by the Plaintiff to show that boundaries for plot 1295 or 2011 have been fixed and that it was not open for the Plaintiff to file his action for trespass.
7. Counsel submitted that in a representative suit, the court must ensure that the interests of those named in the process and those unnamed are protected; that it is mandatory for the Plaintiff to get the authority of the court for the officials of the 4<sup>th</sup> Defendant to be accepted to act in a representative capacity and that this is mandatory under Order 1 Rule 8 in the interest of justice, to ensure the unnamed parties to the suit are made aware of the suit.
8. Counsel submitted that officials of Mjanaheri Self Help Water Project cannot be sued in their personal capacity; that the interest of the unnamed members must be safeguarded and that it is immaterial that the Group is registered under the Societies Act.
9. The Plaintiff's advocate submitted that being a registered organisation, reference to the provisions of Order 4 Rule 4 and Order 1 Rule 8 of the Civil Procedure Rules by the Defendants is misplaced and that in any case, the court can order for a joinder of a party whose presence may be necessary.
10. The Plaintiff's counsel submitted that the boundaries in the suit property are fixed; that there is no boundary dispute and that the survey report confirmed that the water wells are within plot number 1295.
11. In the Plaint that was filed in this court, the Plaintiff defined the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the Chairman, Secretary and Treasurer respectively of the 4<sup>th</sup> Defendant.
12. According to paragraph 5 of the Plaint, on 5<sup>th</sup> April, 2013, the Plaintiff entered into an agreement with the Defendants whereby the Defendants were supposed to manage the utilisation of 3 wells dug on his parcel of land, being Ngomeni Squatters Settlement Scheme/1295.
13. The Plaintiff is seeking for a permanent injunction restraining the Defendants from the use of the water wells and from trespassing or occupying the suit property.
14. In their amended Defence, the Defendants have averred that they have been sued in their representative capacity; that plot 1295 was wrongfully and illegally hived off plot 2011 which is reserved as a public utility for fresh water extraction and that the Plaintiff is not the owner of plot number 1295.
15. The Plaintiff's claim is based on an alleged agreement that he entered into with the Defendants on 5<sup>th</sup> April, 2013.
16. According to the Plaint, the Plaintiff allowed the Defendants to manage the three wells on his land on certain conditions, which conditions have not been met.
17. The Defendants have not denied that they signed the agreement of 5<sup>th</sup> April, 2013, save that they were

not ad litem with the Plaintiff when the agreement was made.

18. Having not denied that they signed the agreement as officials of the 4<sup>th</sup> Defendant, it is only the Defendants, as signatories to the said agreement who can state why they think they were not ad litem with the Plaintiff when they signed the agreement. They cannot claim that the suit is a non-starter just because the rest of the members of the organisation have not been notified of the suit.

19. Being the officials of the 4<sup>th</sup> Defendant, and having signed the agreement of 5<sup>th</sup> April, 2013, the argument that the suit against them is a representative suit cannot hold considering that its only them who can competently testify on the contents of the agreement and on the suggestion that the suit property was illegally hived out of plot number 2011. The Plaintiff was not under any obligation to seek the leave of the court to sue the Defendants.

20. In any event, the Defendants have not denied that the 4<sup>th</sup> Defendant is duly registered as a Society. Indeed, the court has come across the registration certificate no.37425 showing that the 4<sup>th</sup> Defendant was registered as a Society under the Societies Act on 22<sup>nd</sup> May, 2012.

21. It is trite that a Society can only be sued through its officials. It is the officials of a society who have the responsibility of defending a society in a civil claim like the current one, and not all the members of the society.

22. Having being sued, it is incumbent on the said officials to bring to the attention of its members the pendency of a suit. In the event that any member feels that the officials may not represent his interest, he is at liberty to seek the leave of the court to be enjoined in the suit.

23. The 4<sup>th</sup> Defendant is not an amorphous group and the suit against its officials cannot be said to be a representative suit. The Defendants have been properly sued.

24. The second ground that the Defendants are relying on to have the suit struck out or stayed is that the boundaries of the various plots mentioned in the pleadings have not been fixed.

25. Section 18(2) of the Land Registration Act provides that the court shall not entertain any action or proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined and fixed.

26. The Plaintiff's claim is that he is the registered proprietor of land known as Ngomeni Squatters Settlement Scheme/1295.

27. It is the Plaintiff's case that by way of an agreement, it allowed the Defendants to manage the wells situated on the suit property.

28. The Defendants have not claimed to own the neighbouring plot. Instead, its their case that the Plaintiff is not the owner of plot number 1295; that plot number 1295 was wrongfully imposed on the Preliminary Index Diagram 10 and that in event the extraction of fresh water is taking place on parcel of land known as Ngomeni Squatters Settlement Scheme/2011.

29. The issues that the Defendants have raised in the defence are in respect to the proprietorship of plot number 1295 viz-a-viz plot no.2011.

30. Considering that the Defendants are challenging the legality of the Plaintiffs claim over plot number 1295, it is far fetched to argue that the dispute is purely of a boundary nature.

31. Indeed, according to the particulars of fraud in the Defendant's defence, parcel of land known as Ngomeni Squatters Settlement Scheme 1295 "does not border Ngomeni Squatter Settlement Scheme/2011 and that the fresh water wells alluded to in paragraph 5 of the Plaint were sunk by the

members of the 4<sup>th</sup> Defendant over two decades ago of which the Plaintiff is not a member, on parcels reserved for the purpose of Ngomeni Squatters Settlement Scheme/2011 or abutting land owned by individuals, other than the Plaintiff.”

32. Consequently, the issue of who owns the suit property, and whether the wells are on the suit property or on plot number 2011 can only be determined by this court and not the Registrar of Lands.

33. It is for the above reasons that I dismiss the Application dated 18<sup>th</sup> March, 2016 with costs.

Dated, signed and delivered in Malindi this 22<sup>nd</sup> day of **September**, 2016.

**O. A. Angote**

**Judge**