



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 483 OF 2012(O.S)

IN THE MATTER OF SECTION 38 (1) OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ORDER 37 RULE 7 (1) OF THE CIVIL PROCEDURE RULES

**AND IN THE MATTER OF I.R NO. 52764 ON L.R 15172 OF LAND REGISTRATION ACT OF
2012**

AND

**IN THE MATTER OF ARTICLES 159, 162 (2)(b) AND 40 OF THE CONSTITUTION OF
KENYA**

BETWEEN

MUSA IBUSA.....1ST APPLICANT

NORMAN MUTAHI MUNU.....2ND APPLICANT

WANJIRA HUNYA.....3RD APPLICANT

AENEAH LUSIJI SMITH.....4TH APPLICANT

MEREAH OUKO.....5TH APPLICANT

SAMWEL AKENGA AKAMA.....6TH APPLICANT

MUTHENGI MULITA.....7TH APPLICANT

SAMWEL MUNYAO.....8TH APPLICANT

(Suing on their behalf and on behalf of 310

other members of SAIKA-MAILESABA, SIRANGA

and MWENGENYE residents)

VERSUS

MORVEN DEVELOPERS LIMITED.....DEFENDANT

WAWERU KIRATU (Suing on his behalf and on behalf of 1000 other members of

Maili Saba Settlement Siranga, Ogopa and

Mwengenyé Scheme).....PROPOSED INTERESTED PARTIES

RULING

The Application

The Applicants herein have filed an application by way of a Chamber Summons dated 20th March 2014, in which they are seeking the following orders:

- a. That Applicants be granted leave to amend the Originating Summons in terms of their annexed draft amended Originating Summons.
- b. That their attached amended list of the Plaintiffs be substituted and added as the new Plaintiffs in place of the previous Plaintiffs from numbers 2 to 8, and be taken as duly filed and served on the Defendants.
- c. That list of applicants suing as a group of over 1,406 members of Saika Maili Saba, Siranga, Ogopa and Mwengenyé attached herein authorizing the nine (9) new list of Applicants authority to appear and plead act on their behalf as their representative be allowed and adopted as amended as the Plaintiffs' list in place of the previous list of the court record.

The grounds for the application are that the previous seven (7) Plaintiffs have withdrawn from pursuing the suit and no longer have interest or claim in the suit property, and that it is imperative the new amended list of Plaintiffs be substituted and added to have the representative suit continued. Further, that the originating summons herein will be rendered nugatory if the application to substitute and add the new Plaintiffs is not granted at this stage before trial. It was also stated that the Applicants have been staying on the said suit property for over 12 years and have great interest in this property, and therefore it is only fair that they be substituted and added to determine the real matter in dispute. The Applicants averred that they have received authority to appear and plead on behalf of the other 1,406 members, whose list is attached to the Applicants' Chamber Summons.

It was further explained in a supporting affidavit sworn by the 1st Applicant on 20th March 2013 that before the matter could be set down for hearing, the Plaintiffs held their internal election for new leaders wherein the 2nd to 8th Plaintiffs herein lost the elections and that this made them to withdraw from the suit in protest.

The Defendant's Response

The Defendant filed Grounds of Objection to the said Chamber Summons dated 14th April 2014 opposing the same on the grounds that application is an abuse of the Court process, misconceived and frivolous for want of *locus standi*, and should therefore be dismissed with costs. Further, that the application has not been presented with clean hands for want of proper authority to appear for and on behalf of the intended Plaintiffs by virtue of Order 1 Rule 13(2) of the Civil Procedure Rules, 2010, and should therefore be dismissed with costs

Issues and Determination

The parties were directed to canvass the issues arising from the Applicants' application by way of written submissions. The Applicants' Advocates filed written submissions dated 16th April 2014 wherein he argued that the Applicants filed this suit as a representative suit and met the requirements of Order 1 rule 13 of the Civil Procedure Rules. Further, that the authority to act and represent the parties to the suit was complied with during the filing of the suit. Reference was made to the list of names of members which

gave authority to plead in the supporting affidavit to the Plaintiff's Chamber Summons.

The Advocate for the Applicants also cited section 18 of the Environment and Land Court to the effect that this Court shall act without undue regard to the technicalities of procedure and shall not be strictly bound by the rules of evidence or the Civil Procedure Act. However, this Court notes that the said section relied upon was repealed by the Statute Law (Miscellaneous Provisions) Act of 2012. Section 19 as amended now obliges this Court to apply the procedure in the Civil Procedure Act.

The Applicants' Advocate also submitted that the Defendant's preliminary objection did not raise any point of law and raises matter of evidence which require the Court to ascertain certain facts as to whether the authority was given by the members. He relied on the decision in **Mukisa Biscuit Company vs Westend Distributors Limited** in this regard.

The Defendant's Advocates filed submissions dated 20th August 2014. The Advocate submitted that the Applicants had not met the conditions set out under the provisions of Order 13 rule 1 and 2 of the Civil Procedure Rules, which requires that where a party purports to appear on behalf of any other, the party needs to be authorized by such other party, and the authority shall be in writing and signed by the other party so authorizing and filed in the suit.

Further, that the Applicant has purported to substitute outgoing Plaintiffs with others to appear on behalf of many others who have not signed the authority authorizing these persons to appear on their behalf. The Defendant's counsel submitted that Order 1 Rule 13(1) & (2) of the Civil Procedure Rules which is couched in mandatory terms requires the authority to be signed before filing of a suit. The Defendant averred that the list attached by the Applicants is not authentic and does not amount to the authority envisaged under Order 1 Rule 13(2) of the Civil Procedure Rules. Thus, that the persons purporting to be joined and the other attached persons lack *locus standi* in the matter.

I have carefully read and considered the pleadings and submissions made by the Plaintiff and Defendant. The issues for determination are whether the Applicants have met the requirements for the filing of a representative suit, and if so, whether they should be joined in this suit as Plaintiffs.

On the first issue as to whether the Applicants have met the requirements of filing a representative suit on behalf of the persons they state they are representing, the applicable law is Order I Rule 13 which states as follows:-

“(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

The Applicants have attached a list of persons they say they are representing, however upon perusal of the said list the Court notes that the said persons have not signed it, nor indicated in any manner their authority in writing as required to the Applicants. In my view, the written authority of the co-Plaintiffs is a mandatory requirement which a court of law cannot overlook.

I am however not of the view that the entire suit and application herein are as a result bad in law and beyond resuscitation to justify their striking out. In **D.T. Dobie & Co. (K) Ltd vs Muchina [1982] K.L.R.1**, Honourable Madan J.A. held that the court should aim at sustaining rather than terminating a suit, and that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. It is my finding that even though this preliminary objection has been properly taken and raised by the Defendant, it would not be in the interest of justice to strike out the suit or application while curative measures can be undertaken in the form of directions given by this Court to remedy the situation. Furthermore, Article 159(2) of the Constitution now enjoins Courts to dispense justice without undue

regard to procedural technicalities.

On the issue of joinder of the Applicants as Plaintiffs in this suit, Order I Rule 1 of the Civil Procedure Rules states as follows with regard to joinder of a party as a Plaintiff:

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

The commonality that the Applicants claim with the remaining Plaintiff in this suit is that they have been residing on the suit property and were being represented in this suit by the said Plaintiff, and the former Plaintiffs who have since withdrawn the suit against the Defendant. I have perused the court record and note that the original Plaintiffs did indeed file the present suit in a representative capacity. The Applicant's claim therefore for these reasons arises from the same acts and transactions as that of the remaining Plaintiff, and raise the same questions of law. In the circumstances I find that they have made out a case for joinder to this suit subject to their compliance with the law on the bringing of a representative suit.

I accordingly order as follows:

1. That the applicants herein be and are hereby joined as the 1st - 8th Plaintiffs in this suit.
2. The said 1st - 8th Plaintiffs as joined are granted leave to file and serve an Amended Originating Summons within 15 days from the date of this ruling
3. The Plaintiffs to file and serve the appropriate written authority given by all the persons the said Plaintiffs are representing as required under Order 1 Rule 13(2) of the Civil Procedure Rules within the 15 days from the date of this ruling, together with the Amended Originating Summons, failing which the entire suit herein shall stand struck out with costs.
4. The Applicants shall meet the costs of the Chamber Summons dated 20th March 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 17th day of November , 2014.

P. NYAMWEYA

JUDGE