



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 978 OF 2012

Formerly HCC 26 2005

MOSES TOROIRICH TANUI & 3 OTHERSPLAINTIFFS

VS

JOSEPH KIPKEMEI A. MENGICH & 7 OTHERS.....DEFENDANTS

RULING

The application before me is the Amended Motion dated 5 December 2012 filed by the four named plaintiffs and 24 other persons. The application is said to be brought under the provisions of Order 1 Rules 8(3), Order 8 Rule 3(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1, 1A, 3 and 3A of the Civil Procedure Act, CAP 21. The application as drawn seeks the following orders :-

1. *Service be dispensed with in the first instance.*

2. *The other Soy Self-Help Development Group members the persons namely the 5th,6th,7th,8th,9th,10th,11th,12th,13th,14th,15th,16th,17th,18th,19th,20th,21st,22nd,23rd,24th,25th,26th, 27th,and 28th proposed plaintiffs/applicants be and are hereby made parties as plaintiffs to this suit.*

3. *The 1st,2nd,3rd, ad 4th plaintiffs/applicants be and are hereby allowed to have the personal representatives Sarah Cherutich, Jonah K. Chemaoui, John Kibet Tarus, and Benjamin Kibet Tembelio of the estate of the (sic) Samuel Cherutich deceased, Chemaoui Kibet deceased, Samson K. Kigen deceased, and Tembelio Chebet deceased who died on 24-12-2011, 24-12-2002, 19-09-2002 and 24-10-2003 respectively substitute the said deceased persons respectively and be made parties as personal representative of the estate of the 11th, 17th, 20th, and 27th proposed plaintiffs/applicants to this suit.*

4. *The 1st, 2nd, 3rd and 4th plaintiffs/applicants be and are hereby granted leave to amend pleadings as per the attached amended plaint to have all the proposed plaintiffs/applicants be reflected as parties to this suit.*

5. *Directions be and are hereby given to have the amended plaint deemed duly filed and served subject to court fees, application and that the suit be heard on priority basis.*

6. *costs to the plaintiffs/applicants*

The application is founded on the grounds that

(a) *The Soy-Self - Help Group development officials and members including the 1st to 4th plaintiffs/applicants and the proposed plaintiffs/applicants have agreed to have other members of the*

group to be made parties as plaintiffs and the deceased persons to be substituted by their respective personal representatives and made parties as plaintiffs to the suit.

(b) All the living proposed plaintiffs/applicants and the proposed personal representatives of the four deceased persons have sworn supporting affidavits in support of the Notice of Motion dated 6/6/2012 as amended by the Amended Notice of Motion dated 5/12/2012 and are willing to be made parties as plaintiffs to this suit.

(c) The court can grant the orders sort under the provisions of the law cited

The application is supported by 24 affidavits that were annexed to the original Notice of motion. The Amended Notice of Motion has a further affidavit sworn by Joseph C.K. Cheptarus who is counsel to the applicants.

At the outset, I must say that I am not particularly comfortable with the drafting of prayers as the orders themselves. In my opinion, prayers ought to be drafted as prayers and not the order itself. It is a minor issue but I thought that I should point it out.

The application is opposed by the defendants who filed Grounds of Opposition. The grounds of opposition raise the following issues :-

- 1. The application is incompetent, misconceived and an abuse of due process.*
- 2. That the parties sought to be enjoined have no material interest in the subject of litigation.*
- 3. That joinder of the proposed plaintiff would embarrass and occasion delay of the trial of the suit.*
- 4. That the presence of the proposed plaintiffs is unnecessary in effectively and completely adjudicating upon questions involved in the suit.*
- 5. That the proposed plaintiffs are not indispensable parties, the court can thus proceed in their absence.*
- 6. That parties sought to be introduced do not suffer any legal disability and would therefore not be prejudiced in the event they are not made parties to the suit.*
- 7. That 11th, 17th, 25th and 27th parties are not members of Soy Self development group and thereby have no locus standi and cannot be enjoined as plaintiffs.*
- 8. The application is devoid of merit whatsoever.*
- 9. That the applicants be dismissed with costs.*

A little background to this suit will reveal the context within which this application has been filed.

This suit was instituted in the year 2005 by four plaintiffs namely, Moses Toroitich Tanui, William Kiprof Cheruiyot, Simon Kiptanui and Chepkairor Chepsolei, suing as officials and on behalf of Soy Self Help Development Group. It is pleaded that Soy Self Help Development Group is registered with the Department of Social Services Keiyo District. It is the case of the plaintiffs that through Soy Self Help Development Group (Soy SHDG) they purchased 56 acres of land within Growel Farm being land parcels Kiplombe/Kiplombe Block 10 (Growell) 249, 251-275, and 278. It is further pleaded that the defendants on 1st February 2005, invaded the said parcels of land and have settled on the same. The plaintiffs therefore inter alia sought orders of eviction. Alongside the Plaint was filed a list of members of Soy SHDG who are 57 in total.

Upon being served, the defendants filed a joint Defence and Counterclaim. They have denied the claims of the plaintiffs and have averred that they have acquired prescriptive rights over the suit land as they

have been in occupation in excess of 12 years. They have also contended that they have acquired 25 acres of the land through purchase from Growel Farms Ltd in the year 1992. They claimed a total of 65 acres against the plaintiffs. There were several applications but the matter seems to have gone silent from the year 2007 until this application was filed.

In this application there are 24 people who want to be enjoined as plaintiffs to this suit. 20 of them, being applicants 5-10, 12-16, 18, 21-25 and 27th applicants have described themselves as members of Soy SHDG. Four of the applicants, being applicants 11, 17, 19 and 26 have described themselves as personal representatives of four deceased members of Soy SHDG. However, no Grants of Letters of Administration, limited or full, were annexed to demonstrate that they are personal representatives of the four persons said to be deceased. The applicants also want the plaint to be amended to reflect that they are plaintiffs to this suit.

Mr. Cheptarus for the applicants urged me to allow the application. He stated that the proposed plaintiffs are members of Soy SHDG and that the Group bought land which has now been sub-divided into individual plots. He stated that each person has his own specific interest in the sub-plots. He averred that some of the members are deceased and that is why their personal representatives want to be enjoined as parties to this suit on their behalf. He averred that the members agreed amongst themselves that the intended plaintiffs be enjoined.

Mr. Ngigi, for the defendants, on the other hand opposed the application. First he averred that it has not been shown that the four persons sought to be substituted are dead. He also pointed out that no letters of administration have been annexed. He further stated that there has been nothing displayed to show that the land has been sub-divided. He argued that when the plaint was filed, the same was a representative suit and nothing has changed. He averred that none of the four original plaintiffs have been shown to be suffering under any disability. Neither was there anything exhibited such as a register to show that the applicants are members of Soy SHDG.

In reply Mr. Cheptarus contended that there are limited grants annexed to the further affidavit. He argued that the introduction of the applicants to the suit will not embarrass the cause as they have locus standi.

None of the counsels offered any authorities to support their position.

I have considered the application. The application is based on the provisions of Order 1 Rule 8(3) and Order 8 Rule 3 . Order 8 Rule 3 relates to amendment of plaint with leave whereas Order 8 states as follows :-

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.

This suit in my view was filed as a representative suit. The four original plaintiffs from their pleadings made clear that they are prosecuting the suit, not only on their own behalf, but also on behalf of the whole of the membership of Soy SHDG. I stated earlier that there was a list filed with the plaint showing 57 members.

I believe the rationale surrounding representative suits is so as to make litigation manageable. If so many

people are interested in a subject matter, litigation is best handled through a representative suit. This saves the need for each person filing his own suit over more or less the same subject matter. If for example all the 57 people here filed suit, the court will have to handle 57 fresh matters all raising the same issues that can be handled in one suit. The court will have to hear 57 plaintiffs in separate suits who will most likely repeat the same evidence. It is for the simple reason that it is not possible for the court to have the capacity to hear each and every person interested in a subject matter of litigation that involves so many people that the concept of a representative suit was mooted.

I do not know why the 28 persons herein now want to be made plaintiffs to the suit in their personal capacity and why the rest of the members of Soy SHDG who have not been enjoined in this application are comfortable with being represented by the four original plaintiffs. It has not been alleged that the original plaintiffs are not pursuing the matter or are not being keen on the same, or what prejudice the applicants will face if the original plaintiffs continue representing the rest of the members of Soy SHDG. Neither has it been shown what distinct interest these applicants have which is separate to the rest of the membership of Soy SHDG. I do not on my part see what additional input they will bring to the suit which the original four plaintiffs cannot put forth. Save to state that they are members and they want to litigate on their own behalf, the applicants have not stated what new quality they will bring to the suit that the four original plaintiffs are incapable of putting across.

I am aware that Order 1 Rule 8(3) allows persons whom a representative suit was filed on behalf of, to apply to be enjoined to the proceedings. I think before a court may allow such person to be made a separate party, the individual needs to show good reason why the suit ought not to be continued on his behalf by the original plaintiffs. This as I have stated earlier is so as to make litigation manageable. Order 1 Rule 8(1) provides that unless the court so orders, the suit ought to be continued as a representative suit. It is therefore in the discretion of the court to determine whether the circumstances surrounding the application are such that the individual litigant ought to come in and agitate the suit alongside or independently of the original plaintiffs.

I do not think that given the circumstances of this case, it will be prudent to have the applicants enjoined to this suit. Their issues in my view are well addressed by the existing four original plaintiffs. It will make this suit unmanageable if I am to allow all the 24 applicants to be parties to this suit. As I also said, it would mean that there is another group out there who still remain represented by the four original plaintiffs and there is great risk that these too may apply to be enjoined as parties. In the event that one party dies, God forbid, the whole suit will have to be stayed until there is substitution of abatement.

Mr. Cheptarus, stated from the bar that the suit land has been parceled into individual titles and thus each of the applicants has a separate interest. As pointed out by Mr. Ngigi, there is no evidence of such subdivision. Even if there were, it has not been shown that the litigation needs to be continued separately by each applicant rather than being conducted as a representative suit.

If my reasoning above is all flawed, I would still dismiss the application on other points. None of the applicants has shown that he is a member of the Soy SHDG and in absence of such proof, I do not see how I can simply enjoin them to the suit as individuals without proof of membership. Four of the applicants who allege to be representatives of deceased persons of Soy SHDG have not displayed any letters of administration. Mr. Cheptarus argued that they have annexed some letters of administration, and I saw in the affidavit of Mr. Cheptarus a supposed annexure 2 which was said to be letters of administration ad litem. But no such annexure was in the affidavit. There was indeed no annexure 2 in the further affidavit of Mr. Cheptarus, the only annexure being the proposed amended plaint.

For the above reasons, this application must fail. If there is serious and legitimate need for any member of Soy SHDG to be enjoined in his own capacity, such person needs to demonstrate what special interest he has which is not adequately addressed by the representation of the four original plaintiffs. That unfortunately has not been shown by the applicants herein. This application is therefore dismissed but with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF JULY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. Cheptrarus for the applicants.

Mr. Ngigi for the respondents