



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L PET 9 OF 2013

FORMERLY HCC PET 10/2013

KIPSIWO COMMUNITY SELF HELP GROUP.....PLAINTIFF

VS

THE HON ATTORNEY GENERAL AND 6 OTHERS.....DEFENDANTS

(CONSTITUTIONAL PETITION INSTITUTED BY A SELF HELP GROUP IN THE ENVIRONMENT & LAND COURT; PETITION ALLEGING VARIOUS VIOLATIONS BASED ON HISTORICAL INJUSTICES; PRELIMINARY OBJECTIONS THAT THE PETITION HAS BEEN FILED BY AN ENTITY WITH NO CAPACITY TO SUE AND THAT MATTERS OF HISTORICAL INJUSTICE ARE WITHIN THE EXCLUSIVE MANDATE OF THE NATIONAL LAND COMMISSION; WHETHER COURT PRECLUDED FROM HEARING A MATTER BASED ON HISTORICAL LAND INJUSTICES; JURISDICTION OF THE ENVIRONMENT & LAND COURT; WHETHER ENVIRONMENT & LAND COURT CAN HEAR A CONSTITUTIONAL PETITION; PARAMETERS OF SUCH JURISDICTION; WHETHER SELF HELP GROUP HAS CAPACITY TO SUE UNDER THE CONSTITUTION; DEFINITION OF "PERSON" UNDER THE CONSTITUTION; WHETHER FINDING THAT SELF HELP GROUP HAS NO CAPACITY TO SUE CAN PROMPT THE COURT TO ORDER AMENDMENT OF THE PETITION).

RULING

1. This ruling is in respect to two preliminary issues that have arisen. The two issues are :-

(i) Whether this petition has been filed by a person or entity capable of filing such suit or a Constitutional petition.

(ii) Whether this court has jurisdiction to hear this petition considering the provisions of Article 67 and 162(2) of the Constitution, 2010 and Section 3 of the National Land Commission Act, Act No. 3 of 2012, as read together with Section 13 of the Environment and Land Court Act, Act No. 19 of 2012.

2. Before I address the two issues, I think it is prudent that I set out a little background to this petition.

3. This Petition was filed on 19th June 2013 by Kipsiwo Community Self Help Group as the petitioner. There are 7 respondents, being the Honorable Attorney General; the Ministry of Land Housing & Urban Development; The Chief Land Registrar; the Ministry of Agriculture, Livestock and Fisheries; Agriculture Development Corporation (ADC); The National Land Commission (NLC), and Cadon Investments Ltd. The title of the petition claims violations of the Petitioner's Constitutional Rights under Article 10, 19, 20, 21, 22, 23, 27, 35, 40, 47, 67, 73, 165, and 258 of the Constitution.

4. It is averred in the Petition, that the Petitioner's Members and their forefathers have historically been in occupation of the land parcel L.R No. 10703/2 in Nandi County. It is stated that they deem it as part of their cultural heritage and as their ancestral land and that some of their ancestors are buried within the area. The current registered proprietor of the said land is Cador Investments Ltd, the 7th respondent.

5. It is stated in the Petition, that the petitioner's forefathers were forcefully evicted by the colonial British Government from the early 1920s to about mid 1950s to make way for the white settler's community. The petitioner's forefathers were then employed as labourers by the white settlers, and later by ADC, when ADC took up ownership of the farms after independence. It is averred that this continued until the year 1996 when the Kimwani Farms were sub-divided and irregularly and/or illegally allocated to 3rd parties including the 7th respondent. It is claimed that ADC allocated large parcels of the most arable land to the 3rd parties and allocated small parcels of rocky areas, that were not arable at all, to the petitioner's members. It is averred that the main beneficiaries were persons or entities who were not from the local areas, but were well connected, and were unduly favoured.

6. It is claimed that despite the 7th respondent being allocated the land in 1996, it has never taken possession nor been in actual occupation. The petition has stated that it is the petitioner's members who have been in occupation and have been utilizing the same by growing sugar cane and subsistence farming. It has been stated that the issuance of title to the 7th respondent was tainted by fraud, personal interest and was ultra vires and various particulars have been set out.

7. It has been stated in the petition that the 7th respondent is now trying to use the Provincial Administration to threaten the petitioners into moving out of the suit land.

8. The Petition has contended that the 6th respondent, as an independent Commission established under Article 67 of the Constitution of Kenya, has mandate to initiate investigations, into present or historical land injustices, and recommend appropriate action, and that it ought to investigate the manner in which ADC dealt with the sub-division and subsequent allocation of the Kimwani Farms, especially to the 7th respondent. The Petition seeks the following prayers :-

1. A declaration that the actions of the 2nd to 5th respondent to allocate L.R No. 10703/2 to the 7th respondent was unlawful, illegal and null and void.

2. A declaration that the petitioners' rights to fair administrative action, equality and equal protection of the law were infringed.

3. A declaration that the petitioner's right to property and/or ownership over L.R No. 10703/2 was infringed and deserves protection of the court.

4. Cancellation of the title L.R No. 10703/2 issued to the 7th respondent and subsequently the surveying and issuance of title to the Petitioner's members.

5. An order directing the 6th respondent to investigate the circumstances under which the 5th respondent, as trustee of public land, had the title to L.R No. 10703/2 issued to the 7th respondent.

6. Pending the hearing of this petition, the 7th respondent, its agents etc be restrained from disposing, selling, allocating, transferring or doing any (sic) that that in any way may encumber the title L.R No. 10703/2.

7. That this court do issue judicial review order (sic) cancelling the 2nd to 5th respondent decisions and or actions.

8. Damages against the 2nd to 5th respondents' for breaching and/or violating of the Petitioners' Constitutional Rights.

9. Costs of the petition.

10. Any other further order that the Honourable Court may deem it fit and just to grant.

9. Simultaneously with the filing of the Petition, an application for conservatory orders was also filed. Interim orders were issued and the application set for inter-partes hearing. It is at the inter-partes hearing of the application that the objections herein were taken. Of all the respondents, only the 7th respondent has filed a Replying Affidavit to both petition and the application. The Attorney General has filed a replying affidavit only to the application for conservatory orders.

10. In the Replying Affidavits, the 7th respondent has stated inter alia, that the Petition lacks merit. It has asserted that it owns title to the land which was properly granted to it. The 7th respondent has raised issue with the petitioner's identity and has averred that the petitioner, describing itself, as Kipsiwo Company Limited, had approached the 7th respondent to purchase the suit land and an agreement was indeed entered on 15th December 2011, wherein Kipsiwo Company Limited was to buy the suit land for a consideration of Kshs. 32 Million, but they failed to raise the purchase price. It has been averred that the petitioner is now describing itself as a Self-Help Group in order to conceal its earlier encounter with the 7th respondent. It has been denied that the petitioner's members have ever been in occupation of the suit land and that the position is that they forcefully entered the suit property, an act that was reported at Mberere Police Station. The 7th respondent has averred that there are only 13 structures on the land with 16 people cultivating the land who have signed leases with the 7th respondent. The 7th respondent has also deponed that the allocation of land to the 7th respondent cannot be questioned by this court as the right forum for historical injustices is the National Land Commission.

11. Mr. Songok for the 7th respondent, urged me to allow the preliminary objections. As to jurisdiction of the court, he argued that the National Land Commission was established by Article 67 of the Constitution and one of its functions under Article 67 (e) is to initiate and investigate complaints into present or historical land injustices and recommend appropriate redress. He stated that this petition raises issues of perceived historical land injustices, and that the petitioner, ought to first have exhausted Article 67 (e) before coming to court. It was his view that the court has no capacity to do an investigation on the aspect of historical injustice. It was further his argument that the jurisdiction of the Environment & Land Court is spelt out in Article 162 (2) (b) and Section 13 of the Environment & Land Court Act. He stated that historical injustice is not one of the issues that the court has jurisdiction upon. It was his view that the proper avenue is to go through the National Land Commission to address historical injustices.

12. On the issue of locus standi, Mr. Songok averred that the law under which the petitioner is registered is not disclosed and therefore its capacity in law is not established. It was his view that a Self-Help Group cannot sue. He pointed out that the affidavit in support of the petition is sworn by a person who has described himself as Chairman of the Group but that no authority to swear the affidavit has been annexed.

13. Mr. Wabwire for the State, argued that the ELC has no jurisdiction to hear a suit based on the enforcement of fundamental rights and freedoms. He stated that according to Section 13 of the Environment & Land Court Act, the jurisdiction of the ELC to hear constitutional matters is only limited to hearing a matter claiming violations of Articles 42, 69 and 70 of the Constitution.

14. He further supported the argument that the petitioner, in so far as it seeks to agitate rights based on historical injustices, ought to forward that complaint to the National Land Commission, and not the court, for that is the mandate of the National Land Commission. He stated that the 7th respondent holds title and if the petitioner has any claims, it ought to have come under private law and not public law. He further supported the argument that the petitioner, as a Self-Help Group has no capacity to sue and if the suit was being brought on behalf of certain people, then there ought to have been a resolution to that effect. He also stated that no authority had been demonstrated to show that the deponent of the affidavits, one Simion Kipchoge Terer, had been duly authorized to swear the affidavits. He further stated that as drawn, the Petition was claimed to be on behalf of over 300 families, and is therefore a representative suit for which the provisions of Order 1 Rule 8 must be followed. He relied on the cases of *Kituo Cha Sheria vs John Ndirangu Kariuki & Another, Nairobi Election Petition No. 8 of 2013, (2013) eKLR* and *Law Society of Kenya vs Commissioner of Lands & 2 Others KLR 1 (E&L), 456*.

15. Mr. Marube in response, contended that this court has jurisdiction and that the petitioner has capacity. On jurisdiction of the court, Mr. Marube was of the view that the Environment & Land Court (ELC) can hear any constitutional petition as it has the same status as the High Court. It was his view that historical injustices can therefore be handled by the ELC, so long as they claim infringement of the constitution. As to the functions of the NLC, Mr. Marube agreed that one of its functions is to look into historical injustices, but his view was that, that, did not oust the jurisdiction of the court. He also stated that all that the NLC can do is recommend, and that it has no power to make binding decisions, which can only be made by court.

16. As to locus, Mr. Marube contended that Article 22 (2) (d) of the Constitution provides that an association can sue on behalf of its members. He also averred that the definition of "persons" under Article 260 covers associations and bodies, whether incorporated or unincorporated. In his view, the Self-Help Group can bring an action. He further averred that if there is a problem on their capacity, then an amendment may be effected.

17. Mr. Songok's reply was that capacity is not a technical matter, but substantive, and if a suit has been instituted without capacity, it is a nullity ab initio. He reiterated his view that the petition is squarely based on historical injustices for which only the NLC has mandate.

18. I have considered the preliminary points. In my view, three issues need to be determined here to cover the preliminary points.

(a). Whether the ELC has jurisdiction to hear a constitutional petition and if so what nature of petitions.

(b). If answer to 1 is in the affirmative, whether this court can hear a constitutional petition based on historical injustices or whether an issue of historical injustice can only be raised with the National Land Commission.

(c). Whether this petition has been instituted by an entity that has capacity to institute such petition.

(d) If answer to (c) above is not in the affirmative, whether the petition may be amended or whether it ought to be dismissed.

(a) Jurisdiction of the ELC to hear Constitutional Petitions.

19. This point was raised more forcefully by Mr. Wabwire for the State Law Office. It was his view that the ELC can hear a constitutional petition, but only if, such petition alleges violation of Articles 42, 69 and 70 of the Constitution. His view was that the Petition herein alleges violations that are not restricted to Articles 42, 69 and 70, of the Constitution and therefore this court has no jurisdiction to hear this petition.

20. The jurisdiction of the ELC is provided in Articles 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act, Act No. 19 of 2011. I think it is best that I put down these two provisions.

Constitution, Article 162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

Environment & Land Court Act, S.13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) *In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?*

(a) *relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

(b) *relating to compulsory acquisition of land;*

(c) *relating to land administration and management;*

(d) *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

(e) *any other dispute relating to environment and land.*

(3) *Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

(4) *In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

(5) *(Deleted by 12 of 2012, Sch.).*

(6) *(Deleted by 12 of 2012, Sch.).*

(7) *In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?*

(a) *interim or permanent preservation orders including injunctions;*

b) *prerogative orders;*

(c) *award of damages;*

(f) *compensation;*

(g) *specific performance;*

(g) *restitution;*

(h) *declaration; or*

(i) *costs.*

21. These two provisions provide the jurisdiction of the ELC. It is not the first time that an argument that the ELC only has jurisdiction to hear petitions grounded upon Article 42, 69 and 70 has been made. In the case of *Mohamed Said v County Council of Nandi, Eldoret E&L Case No. 2 of 2013, (2013)eKLR*, the

respondent raised a similar argument that since the Constitutional petition therein raised issues that went beyond Article 42, 69 and 70, then the ELC had no jurisdiction. I held as follows :-

I do not agree with counsel for the 2nd respondent that the Environment and Land Court can only hear petitions touching on Articles 42, 69 and 70 of the Constitution. The jurisdiction of the Court is not restricted only to hearing petitions falling under Articles 42, 69 and 70. It can hear any constitutional petition under any provision of the constitution so long as the matter relates to the environment and the use and occupation of, and title to, land.

22. In the case of **Mohammed Said**, various other decisions were considered, including the case of **Omar Tahir Said vs Registrar of Titles & Another, Mombasa High Court Petition No. 22 of 2012, (2013) eKLR**, and **United States International University (USIU) vs Attorney General, Nairobi High Court Petition No.170 of 2012 (2012) eKLR**. An evaluation of those cases, reveal that it is the ELC which has jurisdiction to hear matters touching on environment and land. The manner in which such suits are commenced is immaterial. Whether instituted by plaint, originating summons, judicial review or as a constitutional petition, matters of land and environment fall within the domain of the ELC. The argument that the ELC can only hear petitions touching on violations of Articles 42, 69, and 70 is therefore misguided. The ELC can hear any petition so long as the petition touches on the environment, and the use and occupation of, and title to land.

23. In this petition, the petitioner is seeking to have title to the suit land and this petition falls squarely within the mandate of the ELC. This court is therefore the proper court to hear such a Petition, and not the High Court.

(b) Whether this court can hear a matter touching on historical land injustices or whether the same falls exclusively with the National Land Commission.

24. The second point, raises a different question on jurisdiction. It is the argument of the 7th respondent that this court has no jurisdiction to hear this petition because it is a petition anchored on a claim of historical injustice, which can only be entertained by the National Land Commission. I think this point needs a different level of interrogation.

25. The National Land Commission is established by Article 67 of the Constitution which provides as follows :-

Constitution Article 67. (1) There is established the National Land Commission.

(2) The functions of the National Land Commission are—

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

26. The functions of the NLC as set out in Article 67 (e) are repeated in Section 5 the National Land Commission Act, Act No. 5 of 2012, (NLC, Act) which also clarifies some aspects of jurisdiction. The said section provides as follows :-

5. (1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be —(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—

(a) on behalf of, and with the consent of the national and county governments, alienate public land;

(b) monitor the registration of all rights and interests in land;

(c) ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;

(d) develop and maintain an effective land information management system at national and county levels;

(e) manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and

(f) develop and encourage alternative dispute resolution mechanisms in land dispute handling and management.

(3) Despite the provisions of this section, the Commission shall ensure that all unregistered land is registered within ten years from the commencement of this Act.

(4) Parliament may, after taking into consideration the progress of registration, extend the period set by the Commission under subsection (3).

27. The issue in this suit relates to the function of the NLC set out in Article 67 (2) (e) and S. 5 (e) of the NLC Act. There is no question that one of the functions of the NLC is to "initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress." Any person has a right to complain to the NLC on a perceived historical injustice. Indeed, the

NLC may commence an investigation on historical or present land injustices on its own.

28. But I have not seen anywhere in the Constitution, or in the NLC Act, which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate. I think, so long as one can cite a violation of a Constitutional provision or Constitutional right, then such person may initiate a Constitutional petition and seek redress. I don't think that the basis of such complaint is important. Such complaint could be based on any foundation. It could be, as in our case, a historical injustice, or even a continuing land injustice. It could be founded on labour, or on a violation of due process, or a consumer right, or a social and economic right. The source of the complaint is not material, so long as the petitioner can, with precision, cite the constitutional right or provision that has been violated and seek a remedy provided by law.

29. Thus, in as much as I agree that the NLC has a mandate to look into historical injustices, I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices.

30. That I think resolves the 2nd issue.

(c) Whether this petition has been instituted by an entity capable of instituting such petition.

31. The petitioner in this case is Kipsiwo Self Help Group and has in bracket squatters at ADC Kimwani Farm. The preamble and first paragraph of the petition are drawn as follows :-

The Humble Petition of the Kipsiwo Community Self Help Group, Squatters at ADC Kimwani Farms of P.O Box 139 Songhor in the Republic of Kenya is as follows :-

1. The Petitioner is duly registered self help group with the ministry of Gender, Sports, Culture and Social Service under Registration Number 227211 and has a membership of about members of about 60 with about 300 dependants (sic).

32. It is not clear whether Kipsiwo Self Help Group is synonymous with all squatters of Kimwani Farm, and whether all squatters of Kimwani Farm are members of Kipsiwo Self Help Group. If the squatters have formed themselves into Kipsiwo Self Help Group, this does not come out clearly.

33. I have read the constitution of Kipsiwo Self Help Group which is annexed to the supporting affidavit. The description of the Group is as follows :-

The association of Community Self Help Group from various villages of Kipsiwo village Chemelil Location Tinderet Constituency, Nandi South District. Shall be known as Kipsiwo Community Self Help Group. Therein abbreviated in the style KCSHG. Duly registered with the registrar of the groups of the Republic of Kenya.

34. I have also seen the certificate of registration. It states that Kipsiwo Community Self-Help Group is registered with the office of the District Gender & Social Development Officer (DGSDO) as a Self-Help Group/Project. The registration was done on 15/07/2011.

35. The question that arises is whether Kipsiwo Self Help Group, and indeed whether a Self Help Group, can institute proceedings at all, or at least proceedings of this nature. The starting point, in my view, is Article 22 of the Constitution which is drawn as follows :-

Constitution Article 22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be

instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;*
- (b) a person acting as a member of, or in the interest of, a group or class of persons;*
- (c) a person acting in the public interest; or*
- (d) an association acting in the interest of one or more of its members.*

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- (a) the rights of standing provided for in clause (2) are fully facilitated;*
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;*
- (c) no fee may be charged for commencing the proceedings;*
- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and*
- (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.*

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

36. It will be seen from the above provision, that proceedings alleging a violation of the bill or rights, may be instituted by a "person". Article 260 of the Constitution, which is the interpretative section, defines "person" as follows :-

“person” includes a company, association or other body of persons whether incorporated or unincorporated;

37. It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights.

38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.

39. This was indeed the holding in the case of ***Kituo Cha Sheria vs John Ndirangu Kariuki & Another***. In this case a petition was instituted by Kituo Cha Sheria. An application was filed to dismiss the petition on the grounds inter alia that the petitioner is a non-entity and lacks the requisite locus standi to file and

prosecute the petition. Kimondo J, found that Kituo Cha Sheria is not a legal entity capable of bringing an action in its own name and averred that it can only maintain an action through its officials or other person nominated by its board.

40. The question of whether Self-Help Groups have capacity to sue arose in the case of ***Dennis Olooihero & 2 Others vs The Art of Ventures Limited & 2 Others, Nairobi HCCC 1358 of 2005 (2006) eKLR***. This was a suit by persons who described themselves as members of a Community Based Organisation (CBO), registered under the Ministry of Gender, Sports, Culture and Social Services. The court held that such organization has no legal capacity and proceeded to strike out the pleadings. In the said suit, the Aluoch J, indeed went as far as alluding that such entity was an unlawful society. She stated thus :-

"I am satisfied from the evidence I have considered so far, that the plaintiffs/applicants herein lack the legal capacity to commence or maintain the present proceedings, since they represent an unlawful society in law...". The judge had in mind Section 9 of the Societies Act, which requires societies to be registered within 28 days of formation.

41. It is clear that Self- Help Groups are not incorporated bodies. In fact I know of no law that recognizes them or incorporates them. They were probably the brain-child of administrators who at times had to come up with a tool to identify specific groups of people that needed assistance, or needed to undertake projects together. They seem to have helped harness resources at community level. The only problem is that the Government has not put in place any legal framework under which they can be registered and managed. Such groups, in absence of a legal framework, indeed stand the risk of being declared unlawful societies as held in the case of ***Dennis Olooihero***.

42. Self Help Groups having no legal personality, cannot therefore institute proceedings in their own name.

43. Kipsiwo Self Help Group had no capacity to institute action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.

(d) What is the fate of this Petition : Can the Petition be Amended ?

44. The next issue is whether as it stands, this petition ought to be struck out or whether it is capable of amendment. The Rules, do provide for an avenue to amend. This is in Rule 18, of the Constitution of Kenya, (Protection of Rights and Fundamental Rights) Practice and Procedure Rules, 2013, which is drawn as follows :-

Rule 18. A party that wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the Court.

45. With regard to joinder and misjoinder of persons, Rule 5 of the same rules provides as follows :-

Rule 5. The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and

to what extent, may be determined as between all parties.

(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

46. It can be seen from the foregoing, that in appropriate cases, amendments may be effected. The question is whether, this is one of the appropriate cases in which an amendment may be effected.

47. In the case of **Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank (1992) KLR 354**, a suit was instituted by a religious organization which was an unincorporated body. Not without sympathy, Bosire J, proceeded to dismiss the suit for want of capacity to sue, and was not swayed that the defect could be cured by amendment.

48. A similar issue arose in the case of **St. Mary School, Nairobi vs Josphat Gitonga Kabugi, Nairobi (Milimani) HCCC No. 65 of 2004** (www.kenyalaw.or.ke). In this case the court held that the suit was instituted by an unincorporated body which had no capacity to sue. A point was made that an amendment could be effected. Azangalala J (as he then was) stated thus :-

"Counsel for the plaintiff school at the end of his submission submitted that the want of capacity to sue is curable under Order 10 rule 1. It may very well be so. But at this stage there is no application for amendment oral or by Chamber Summons as provided for under Order 10 Rule 22 of the Civil Procedure Rules. Which other person or persons would substitute the plaintiff school anyway ? Is it the Board of Governors if there is one ? If there is one who are its officials ? If the plaintiff run by a management team ? if so who are the managers ? ... In brief therefore, there is no material available for substitution of the plaintiff school. In the result the preliminary objection succeeds and the plaint and the application..are struck out as the plaintiff has no legal existence. "

49. The above two suits concerned suits instituted by way of plaint and the Civil Procedure Rules apply. One may argue that in a Constitutional Petition, the court ought to be more liberal. However, in the **Kituo Cha Sheria** case, the court did not hesitate to strike out the petition. The court further stated that the legal capacity of a party to institute proceedings in court is not a technical matter, or one of form, and added that the failure to bring an action by a recognized juridical person is one of law and substance which cannot be accommodated within the latitude of Article 159 (2) (d) of the Constitution. The court asserted itself as follows :-

"In the end, I have reached the conclusion that 'Kituo Cha Sheria' is not a competent legal person known under Article 258 of the Constitution..Its capacity to bring an action in its own name and a petition to challenge an election does not find support in law or precedent. In the result, there is no petitioner in

Court or a valid petition. It follows as a corollary that the petition is incurably defective. It has no legs to stand on. It is hereby struck out and dismissed."

50. I could probably have allowed the petition to stand, and be amended, if I had known who precisely the petitioners are. But I do not know who they are and even if I am to allow a substitution, with whom will I substitute the plaintiff ? Substituting the initiator of a claim is always more difficult than substituting the defendant/respondent. The court in absence of an application, finds it difficult to assume that a particular person, is the true plaintiff. It is much easier to substitute a defendant/respondent because in most cases, the person intended to be sued can be identified, though probably, wrongly described.

51. I think given the circumstances, I have no option but to strike out the petition as having been filed by an entity unknown in law and which has no capacity to institute action in its own name. It is also not clear who the precise persons who intend to benefit from this petition are.

52. Costs ordinarily follow the event, but in this case, I do not even know who will bear the responsibility of paying the costs. I think, it is best that I make no order as to costs.

53. This petition is hereby struck out and dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 8TH DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. N. Marube present for the Petitioner

Mr. D.O. Wabwire present for the 1st - 4th Respondent

Mr. J.K. Songok present for the 7th Respondent.

N/A for the 5th and 6th respondents

8/10/2013

CORAM S. MUNYAO J

CC Grace

Mr N. Marube present for Petitioner

Mr. D.O. Wabwire present for the 1st-4th Respondents.

N/A for 5th and 6th Respondents who have not entered appearance.

MR. J.K. SONGOK present for 7th Respondents.

Ruling on the preliminary objections is read out in open court as per the full text of the ruling on record. The final order is that the petition is hereby dismissed with no orders as to costs. The petition having been dismissed, all interim orders are hereby vacated.

SIGNED

S. MUNYAO J

8/10/2010

