



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 23 OF 2018

BETWEEN

1. JOSEPH SOMBO

2. MWANDURI MERI

3. BAHRU MWAGUNDU

4. MWAHUI MWARIJAMBA

5. KAZUNGU KARISA (Suing on behalf of

15000 individuals of the Amwezi and Mirima clans

of the Duruma Community.....**APPELLANTS**

AND

1. NYARI INVESTMENTS

2. MOCASH PROCESSERS (K) LTD

3. COUNTY COUNCIL OF KWALE

4. NATIONAL LANDS COMMISSION

5. THE DISTRICT COMMISSIONER KINANGO

6. DANIEL ARAP MOI.....**RESPONDENTS**

*(Being an appeal from the decision of Environment and Land Court at Mombasa, (S. Mukunya, J.) dated 24th October, 2014)*

in

*(Civil Suit No. 227 of 2012)*

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**RULING OF THE COURT**

1. **Joseph Sombo, Mwanduri Meri, Bahru Mwangundu, Mwahui Mwarijamba and Kazungu Karisa** (Suing on behalf of 15,000 individual (sic) of the Amwezi and Mirima clans of the Duruma Community) (hereafter appellants/applicants), moved to the High Court of Kenya at Mombasa vide plaint dated 19th October, 2012 seeking several reliefs against the respondents herein. A verifying affidavit of even date in support of the plaint was sworn by **Joseph Sombo** who deposed that he had authority to swear the same “*on behalf of approximately 15,000 individuals belonging to the Amwezi and Mirima clans of the Duruma Community.*” The affidavit makes no reference to any annexures thereto.

2. An amended plaint was later filed later on 9th September, 2013 bringing on board a 5th respondent in the name of Daniel Toroitich Arap Moi as the 6th respondent. A verifying affidavit in support of the amended plaint bore no reference to any annexures either.

3. The respondents filed and served their amended statements of defence, lists of witnesses and documents were filed in compliance with the Civil Procedure Rules. Submissions were also filed by respective counsel.

4. After all preliminaries were complied with, including the hearing and disposal of some interlocutory applications and a preliminary objection, the main suit proceeded to hearing on 1st October, 2014. Joseph Sombo Saidi, the first appellant testified and told the court that he had “brought the case on behalf of 15,000 others”. On cross-examination by counsel for the 2nd defendant/respondent Joseph stated:

*“The 15,000 people have not signed anywhere that I proceed with the suit.”*

On cross examination by Mr. Ngare, learned counsel appearing for the 4th and 5th respondents, Joseph answered as follows *“I sued on behalf of 15,000. I have no authority to file the case on behalf of 15,000 others.....”*

5. After considering the evidence adduced before the court in entirety, including rival submissions of counsel, the trial Judge (Mukunya,J.) rendered the now impugned judgment dated 24th October, 2014 in which he dismissed the suit and awarded costs to the defendants, the present respondents. Aggrieved by the said judgment, the appellants moved to this Court vide the memorandum of appeal dated 23rd February, 2018 citing thirteen grounds of appeal. The appeal is yet to be fixed for hearing.

6. When parties’ advocates appeared before the Deputy Registrar for case management conference, **Ms. Oluoch Wambi**, learned counsel for the respondents drew the Deputy Registrar’s attention to the fact there were some documents which were not part of the High court record that had been sneaked into the record of appeal. These documents were contained at pages 18 to 256 of the record and it was a list of some persons described as *“Natives of Nyari Estate Taru and Chengoni Locations”*. She maintained that those persons were not parties before the High Court and including the list in the record of appeal would prejudice the respondents herein. She also drew the Deputy Registrar’s attention to the fact that the learned Judge of the High Court had acknowledged in his judgment that there was no such list. She asked that the list be struck out; a request that was opposed by **Mr. Mwandige**, learned counsel appearing for the appellants. The matter was not addressed before the Deputy Registrar subsequently as directed but instead, Ms. Wambi took up the issue when the matter was placed before us on 1st October, 2018 for ‘directions’.

7. The Court advised counsel to file a formal application seeking the striking out of the said documents, hence the Notice of Motion dated 6th November, 2018 that is now the subject of this Ruling. According to the applicant, the said documents contravene **Rule 87 Court of Appeal Rules**; are scandalous vexatious and frivolous; are filed with a view to mislead the Court and to prejudice the respondents and are abusive of the due process of the court. She asks the Court to expunge the impugned documents from the record. The gist of the deponent’s in the affidavit of Awadh Saleh Said in support of the application is that the documents were not part of the record before the High court and they have just been sneaked in with the intention to mislead the court.

8. On the other hand, the appellants (respondents in the application) through Joseph Sombo have denied that the documents are being sneaked into the record of appeal, saying that they were *“filled together with those appearing in the Record of Appeal in this case and were certified as true copies by the learned Judge of the High Court. Annexed is a copy of the duly certified proceedings marked “J.S.1”*

The annexure referred to however, are copies of the proceedings and the judgment. The annexure does not include the disputed list. In any event, if the list was before the High Court, it must have been filed before the commencement of the said proceedings. There is actually no rebuttal in the replying affidavit to the claim that the said list was not filed with the verifying affidavit to the plaint, amended plaint, or at any time before judgment.

9. In her oral submission before us, Ms. Wambi urged the Court to strike out the said list saying that the same was not part of the documents before the High court and admitting the it would be highly prejudicial to the respondents in the appeal.

10. Mr. Maina learned counsel for the appellants opposed the application saying the documents were part of the High court record which they photocopied along with the other documents forming the record of appeal. We understood learned counsel to be saying that the documents were already in the High court file as at the time they photocopied the same. He did not however, say at what time the said list was filed. He nonetheless urged us to dismiss the application and allow the appeal proceed to hearing with the record as currently constituted.

11. We have considered the application, the rival affidavits, the oral submissions of counsel and the law. **Rule 87(3) Court of Appeal Rules** gives this Court or the Registrar of the Court power to exclude from the record, documents or part of documents which in the judges view, for one reason or another should not form part of the record. One such pertinent reason would be that the documents in question were not part of the record before the trial court and have been irregularly, and without leave of the court been included in the record of appeal.

12. The issue before us is straight forward. Was the disputed list part of the pleadings filed before the High court? We have carefully perused the entire record. As stated earlier in this ruling, the said list was not annexed either to the affidavits verifying the correctness of the plaint, or the amended plaint. It has not been mentioned in the plaintiffs’ list of documents, and nor had it been referred to by any of the witnesses. The appellants appear to have misconstrued the learned trial Judge’s opening statement in his judgment where he posited: -

*“The five plaintiffs filed this suit on behalf of 15,000 individuals...”* The learned Judge was just quoting what the plaintiffs had stated in their plaint. Indeed the learned Judge addresses the issue at length at paragraph 18 of his judgment which we reproduce here in extenso:-

*[18] The five plaintiffs are alleged to have filed this suit on behalf of 15,000 individuals of Amwezi and Mrima clans of Duruma*

*Community. The second defendant filed a statutory declaration and said that he did not file this suit and he was not consulted when his name was used. He did not take part in these proceedings. The suit therefore remained with four plaintiffs suing for the alleged 15,000 others. This is supposed to be a representative suit. The Civil Procedure rules states as follows on representative suits;*

*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 proceedings, and in like manner, where there are more defendants than one, anyone 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.”*

13. From where then do the appellants get their conclusion that the learned trial Judge acknowledged theirs to be a representative suit?

From the foregoing, it is clear in our minds that the list in question was not part of the record. The list is so long – over 200 pages and the learned trial Judge could not have failed to see it, nor would learned counsel on record then. Had it been part of the record, it would have elicited several questions on cross-examination for instance, why does the list have 17,000 persons and not 15,000; the large number of the under-age and who were suing on their behalf etc.

14. We are not in the least persuaded that the list formed part of the record before the High Court. We also find that sneaking it in at this point is not just irregular and unprocedural, but tantamount to abuse of the process of the court.

The objection by the applicants/respondents in the appeal is well taken. The application is hereby allowed with the result that documents contained between page 18 to page 255 be and are hereby expunged from the record of appeal. Costs of this application will be in the substantive appeal.

**Dated and delivered at Mombasa this 9th day of May, 2019.**

**ALNASHIR VISRAM**

**JUDGE OF APPEAL**

**W. KARANJA**

**JUDGE OF APPEAL**

**M. K. KOOME**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**