



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 105 OF 2016**

**BETWEEN**

**ANDERSON MOLE MUNYAYA ..... 1<sup>ST</sup> APPELLANT**

**ISAAC JILO ONOTO ..... 2<sup>ND</sup> APPELLANT**

**DANIEL KITSAO BAYA ..... 3<sup>RD</sup> APPELLANT**

**MJANAHERI SELF HELP WATER PROJECT ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MORRIS SULUBU HARE ..... RESPONDENT**

*(An appeal from the Ruling of the Environment and Land Court at Malindi (Angote, J.) dated 22<sup>nd</sup> September, 2016*

*in*

***ELC No. 136 of 2015)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. Morris Sulubu Hare (the respondent) is the registered owner of a parcel of land described as Ngomeni Squatter Settlement Scheme/1295 (herein after referred to as the suit land). By an agreement dated 5<sup>th</sup> April, 2013 he allowed Mjanaheri Self Help Water Project (the 4<sup>th</sup> appellant) to manage the utilization of wells on the suit land at a consideration. It appears the relationship did not go on smoothly as the respondent terminated the agreement on grounds that the 4<sup>th</sup> appellant had breached the terms therein. Subsequently, he served several notices upon the said appellant to give vacant possession of the suit land without success.

2. He then decided to institute a suit not only against the 4<sup>th</sup> appellant but also against Anderson Mole Munyaya (1<sup>st</sup> appellant), Isaac Jilo Onoto (2<sup>nd</sup> appellant) and Daniel Kitsao Baya (3<sup>rd</sup> appellant) in their individual capacities as well as on behalf of the 4<sup>th</sup> appellant. He sought a permanent injunction restraining the appellants from trespassing on the suit land and damages for trespass. The appellants

entered their joint statement of defence under protest and filed an application dated 18<sup>th</sup> March, 2016 praying for the suit to be struck out. The application was premised on the grounds that the respondent had sued the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> appellants as representatives of the members of the 4<sup>th</sup> appellant without complying with the requirements under **Order 1 Rule 8** of the **Civil Procedure Rules**. Further, the Environment and Land Court (hereinafter referred to as ELC) lacked jurisdiction to entertain the suit by virtue of **section 18** of the **Land Registration Act**.

3. Upon considering the application and arguments advanced on behalf of the parties, the learned Judge (Angote, J.) in a ruling dated 22<sup>nd</sup> September, 2016 dismissed the appellants' application with costs. It is that decision that has provoked the instant interlocutory appeal before us which is predicated on the grounds that the learned Judge erred by -

**a) Failing to find the suit was instituted against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants in their representative capacity.**

**b) Finding that the court had jurisdiction to entertain the suit in light of clear provisions of Section 18 of the Land Registration Act.**

4. This appeal was disposed of by both written submissions and oral highlights. Mr. Kimani appeared for the appellants while Mr. Sumba appeared for the respondent.

5. According to the appellants, the appeal turned on the determination of two issues namely, whether the suit against the appellants was a representative suit and whether the suit raised a boundary dispute. Elaborating further, Mr. Kimani argued that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were sued in their capacity as officials of the 4<sup>th</sup> appellant which was an unincorporated community based organization. Therefore, it was imperative for the respondent to have obtained leave of the court as envisioned under **Order 1 Rule 8** of the **Civil Procedure Rules** to enable the said appellants defend the suit on behalf of the unnamed members of the 4<sup>th</sup> appellant. The purpose of seeking leave is threefold, that is, it ensures that the interests of the unnamed members are safeguarded; ascertains that the appellants being sued are indeed representatives of the members of the 4<sup>th</sup> appellant; and notifies the members of the institution of the suit. In that regard, the case of **J. J. Campos & L. D'cruz vs ACL De Souza & 5 Others [1933] KLR 86** was cited.

6. Apparently, during the execution of the agreement between the parties, there was uncertainty as to whether one of the wells under the said agreement was on the respondent's land. As per the terms of the agreement, the parties were to resolve the uncertainty before the 4<sup>th</sup> appellant could pay for the utilization of the particular well in question. To the appellants this amounted to a boundary dispute and since the boundary of the suit land had not been fixed as required under **section 18** of the **Land Registration Act** the ELC had no jurisdiction to entertain the suit.

7. In response, Mr. Sumba contended that the appeal was frivolous and ought to be dismissed. In his view, it was clear from the pleadings that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were sued both in their individual capacity and as officials of the 4<sup>th</sup> appellant. There was no need for the respondent to have sought leave to institute the suit against the appellants. Even assuming the said appellants were not proper parties, that alone would not justify the striking out of the suit. The court had power to grant leave to the respondent to amend his plaint and sue the right party. To buttress his argument he referred to **Order 1 Rule 9** of the **Civil Procedure Rules**.

8. As far as the respondent was concerned, there was no boundary dispute and all he sought was vacant possession of his property. Moreover, vide a consent order dated 21<sup>st</sup> September, 2015 the parties each engaged different surveyors who both confirmed that the well in question was on the suit land. Consequently, **section 18** of the **Land Registration Act** was not applicable.

9. We have considered the record, submissions by counsel and the law. In our view, the consideration of

whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were proper parties cannot be done in isolation without the examination of the 4<sup>th</sup> appellant's standing in the suit. The Supreme Court of Nigeria succinctly observed in **Goodwill & Trust Investment Ltd. and Another vs Witt & Bush Ltd.** - SC 266/2005 that -

***“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it and its judgment will amount to a nullity no matter how well reasoned.”***

10. It is not in dispute that the 4<sup>th</sup> appellant is registered under the **Societies Act** and as such, it is an unincorporated body which lacks the requisite legal capacity to sue or be sued. See **Grace Mwenda Muthuri vs The Trustees of Agricultural Society of Kenya - Civil Appeal No. 250 of 2015 (unreported)**. It can only sue and be sued through its office holders. **Section 2** of the **Societies Act** defines an officer -

***“officer”, in relation to a society, means the president, vice-president, chairman, deputy chairman, secretary or treasurer thereof, or any member of the committee, council or governing body thereof, or any person who holds in the society any office or position analogous to the foregoing, but does not include a trustee, auditor or patron who takes no part in the management of the society;..”***

11. Equally, it is not in dispute that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants are officers of the 4<sup>th</sup> appellant. Therefore, we find that there was no requirement for the leave under **Order 1 Rule 8** of the **Civil Procedure Rules** which stipulates;

***a) 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.***

***b) 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.***

***c) 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.***

12. Be that as it may, we find that the 4<sup>th</sup> appellant is not a proper party for the reasons outlined above. We invoke **Order 1 Rule 9** of the Civil Procedure Rules and strike out the 4<sup>th</sup> appellant as a party. In doing so, we are guided by the sentiments of this Court in **P C Desai vs Navin M Patel t/a Sandpipers Constructions & Civil Engineering Services & 13 Others [2001] eKLR** thus,

***“The learned judge appreciated that the power to strike out a pleading is not to be lightly exercised. But when it is clear that wrong parties are sued and when the correct party to be sued is known no purpose could be served by letting the wrong party remain on record.”***

13. Last but not least, **section 18 (2)** of the **Land Registration Act** provides;

***“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”***

Taking into account the foregoing, we, like the learned Judge, find that there was no boundary dispute and there was nothing to divest the ELC jurisdiction over the matter.

14. In the end the appeal lacks merit save that the 4<sup>th</sup> appellant is struck out as a party. We hereby dismiss the appeal with costs.

**Dated and delivered at Malindi this 5<sup>th</sup> day of October, 2017**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W.KARANJA**

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**JUDGE OF APPEAL**

**M.K.KOOME**

... ..

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**