IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 40 OF 2012

BETWEEN

1. MARTIN MAGINA OKOYO.....1ST APPELLANT

2. THOMAS OCHIENG ONGOGO.....2ND APPELLANT

(Suing on their own behalf and on behalf of Yimbo Yala Swamp Farmers Society)

AND

1. BONDO COUNTY COUNCIL.....1ST RESPONDENT

2. SIAYA COUNTY COUNCIL.....2NDRESPONDENT

3. DOMINION FARMS LIMITED.....3RD RESPONDENT

(Being an appeal from the ruling and order of the High Court

at Kisumu by Chemitei, J.) dated 2nd November 2011

In

E & L C No.168 of 2011)

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JUDGMENT OF THE COURT

This appeal which is brought by the appellants, ***Martin Magana Okoyo*** and ***Thomas Ochieng Ongogo,*** is from a decision of the High Court dismissing their Notice of Motion dated 7th October 2011 in which they sought restraining orders to which we refer below and striking out their suit filed simultaneously with the application.

The facts in brief are that, Dominion Farm Limited, *(Dominion),* the 3rd respondent, sought to develop and manage a large scale irrigated farm comprising 6900 hectares at the Yala swamp. In pursuance of this venture, the Bondo County Council and the Siaya County Council caused a Gazette Notice No. 2570 of 25th August 1970 to be issued setting apart approximately 3,700 hectares of land *("the Gazetted portion"*)

in accordance with the provisions of ***Part IV*** of the ***Trust Lands Act***. The Gazetted portion was accordingly leased to Dominion to undertake its agricultural activities where the dimensions and boundaries of the Gazetted portion were more particularly defined in the Gazette Notice. The remaining 3200 Ha *("the ungazetted portion")* had yet to be set apart by the 1st and 2nd respondents, and so it remained as community land.

It was deponed by ***Martin Magina Okoyo*** who swore an affidavit in support of the appellants' Motion that, on 30th day of August 2011, Dominion through it servants, or agents descended on the appellants and the members of the Yimbo -Yala Swamp Farmers Society's (the Society) farms situated in the ungazetted portion with bulldozers and other big earth moving machines and equipments and destroyed their crops and some of their houses and had continued this destruction on a day by day basis.

It was for this reason that the appellants had filed a Motion, where they sought orders;

> *1. THAT the 3rd Defendant/respondent be restrained from accessing, trespassing, destroying, digging or in any other way interfering with the community land pending the hearing and determination of the application;*
>
> *2. THAT the 3rd Defendant/respondent be restrained from accessing, trespassing, destroying, digging or in any other way interfering with the community land pending the hearing and determination of the suit;*
>
> *3. THAT the 3rd Defendant/Respondent herein be ordered to pull out all its earth moving machinery from the disputed area and cease/stop all actions that are leading to the destruction of the crops and huts and any structures on the community land pending the hearing and determination of this suit;*
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> *4. THAT The 3rd Defendant/Respondent be confined and restricted in/to the 3700 hectares of gazetted land which was gazetted vide Gazette Notice No. 2570 dated 4th September 1970 whose boundaries are well demarcated on the ground pending the hearing and determination of this suit; and*
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> *5. THAT the County Council of Bondo be restrained from effecting any transfer or charge or any other transaction relating to the Plaintiff's community land pending the hearing and determination of the suit.*
>
> *6. THAT the OCS Usenge Police Station in Usigu Division ensures compliance with the court orders.*

Simultaneously with the Motion dated 7th October 2011 the appellants filed a plaint accompanied with the verifying affidavit of Martin Magina Okoyo.

Prior to commencement of the proceedings, the respondents filed a preliminary objection on 11th October 2011 where they claimed that the appellants' suit was fatally defective as it was verified by a perjured affidavit, that it failed to disclose the existence of an earlier suit and that as a result, the verifying affidavit was fatally defective and could not support the plaint and therefore ought to be struck out.

The High Court dismissed the appellants' injunction application for reasons that it did not meet the threshold requirements for injunctive relief. The court further struck out the suit for failing to satisfy the requirements of a representative action under ***Order 1 rule 13 (1) and (2)*** of the ***Civil Procedure Rules,*** and for failing to disclose that a previous suit had been filed in respect of the same parties and subject matter.

Being aggrieved by the decision of the court, the appellants have filed this appeal specifying 16 grounds of appeal which in summary are that; the learned judge erroneously based his decision on the Gazetted

portion yet the appellants' dispute was in respect of an ungazetted portion; that the learned judge wrongly concluded that the appellants' suit was based on fear and apprehension yet it was a fact that Dominion had invaded the appellants' ancestral land and destroyed their property; that the learned judge dismissed the suit on a preliminary objection without cognizance of the fact that it raised triable issues which were not in any way addressed by the court; that the learned judge disregarded the evidence that showed that Dominion had caused substantial damage to the environment and water sources of the local communities; that the court overlooked the fact that as the appellants were custodians of the community land, they were well within their rights to approach the trial court to seek relief against Dominion's encroachment onto community land; and finally, the court was faulted for holding that the appellants' authority to act was fatally defective.

Mr. Ojijo[GK1] **,** learned counsel for the appellants, submitted that the learned judge erred by determining the suit on the basis of the Gazetted portion, which was not at the heart of the dispute; that the dispute concerned the ungazetted portion which had not been allocated to Dominion; that the ungazetted portion remained trust land which the appellants occupied, and that the suit was brought to forestall further encroachment of the ungazetted portion by Dominion.

Counsel faulted the learned judge for dismissing the suit on a preliminary objection yet, the suit raised several triable issues including infringement of the appellant's rights by Dominion, that the authority to act was obtained when the members of the Society had conducted elections and, much as the list was utilized for elections it also served as authorization to initiate the suit. On the pleadings, counsel submitted that the substance of the suit was paramount to the format of the pleadings, provided a course of action was disclosed. Counsel argued that the substantive suit should not have been struck out on the basis of its format.

Finally, counsel contended that the preliminary objection did not meet the requirements laid down by ***Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited (1969) EA. 696,*** on whether a pure point of law had been raised, or whether, there was a need for the facts to be ascertained and that as the dispute could only have been determined by taking of evidentiary material, it ought not to have been struck out.

Mr. Ombajo, learned counsel also appearing for the appellants, [GK2] supported the appeal. Counsel contended that the matter affected the whole community, and in dismissing the substantive suit, the court violated the parties' right to be heard.

Mr. Odongo, learned counsel for the 1st respondent, opposed the appeal and submitted, regarding the appellants' previous proceedings, that though they were withdrawn, the appellants had failed to bring them to the Court's attention. On the issue of authority to act, counsel took the position that since the list specified that it was intended for the conduct of the Society's election, and not as authority for the appellants to act on behalf of the Society in the suit, it could not be the basis of a representative suit.

Regarding the alleged interference with the ungazetted portion, counsel asserted that the appellants, had not proved that the 1st and 2nd respondents were in the process of transferring it to Dominion, and further that the court rightly found that there was no evidence to show that Dominion sought to alienate the appellants from the community land, or that it was responsible for damaging the appellants' property. Counsel argued that, the court could not be faulted for declining to grant an injunction on an unspecified area, given that the appellants had failed to produce a surveyor's report. Though served on 13th November, 2015, there was no appearance for the 2nd respondent.

Mr. Ojuro, learned counsel for Dominion, also opposed the appeal, and submitted that the Memorandum of Understanding specified that the Gazetted portion had been leased to Dominion, but that the realization of the ungazetted portion was a matter for the future. Counsel supported the position taken by counsel for the 1st respondent that the election list was not capable of granting authority to the appellants to represent the Society in the suit. It was counsel's further argument that the appellants had not demonstrated ownership of the ungazetted portion, and as such, had not established the basis upon which they had

brought the suit.

We have considered the appeal and the submissions of the parties in this intensely contested appeal, and are of the view that the issues for our consideration are firstly, whether the High Court rightly dismissed the appellants' suit for the lack of authority to act on behalf of the members of the Society, and for failing to disclose that no other suit was pending or that no previous proceedings were filed; and secondly, whether, in declining to grant an injunction the learned judge misdirected himself by determining that a prima facie case with a possibility of success had not been established since the dispute concerned the Gazetted portion, instead of the ungazetted portion.

[GK3] We will begin by considering whether the learned judge rightly exercised his discretion to strike out the representative suit as having been improperly brought, and for failing to comply with the provisions of ***Order 4*** of the ***Civil Procedure Rules.***

Regarding the representative suit, the High Court found that the list of farmers attached to the appellants' plaint dated 7th October 2011 entitled "Authorization to Act " on behalf of Yimbo -Yala Swamp Farmers was not an authority to act, but a list of members of the Society intended for the elections of its office bearers, and therefore did not satisfy the requirements of ***Order 1 rule 13*** of the ***Civil Procedure Rules, 2010,*** which provides;

> ***"(1) Where there are more plaintiffs than one, any one or more of them may be authorized by one 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 of them may be authorized by any other of them to appear, plead or act for such other in any other proceeding.***
>
> ***(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."***

The list of members provided clearly indicates that it related to the Society's elections held on 30th March 2011. There are no endorsements on the list by the authorized officials of the Society authorizing the appellants to institute the proceedings on behalf of the Society or its members. Without such authority, we agree with the learned judge that as ***Order 1 rule 13 (2)*** of the ***Civil Procedure Rules*** was not complied with, and the representative action suit could not be sustained, with the result that it was liable to be struck out.

But having said that, it is observed that the appellants have also brought the suit on their own behalf as occupants of the ungazetted portion which they contend is trust land. The suit is supported by a verifying affidavit of Martin Okoyo, though there is no verifying affidavit for ***Thomas Ochieng Ongogo,*** the 2nd appellant. We find that the suit by ***Martin Okoyo*** is properly brought, and there is nothing to preclude him from pursuing the suit in his own individual capacity.

There is then the complaint that the appellants had filed ***HCCC No. 141 of 2011*** that concerned the same parties and the same subject matter as the instant suit, and that they had failed to disclose the previous proceedings contrary to the requirements of ***Order 4*** of the ***Civil Procedure Rules***. ***Order 4*** of the ***Civil Procedure Rules*** sets out the particulars of a plaint. More particularly, ***Order 4 rule 1 (f)*** requires;

> ***"…an averment that there be no other suit pending, and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter and that cause of action relates to the plaintiff named in the plaint."***

Order 4 rule 1 (6) of the ***Civil Procedure Rules*** further stipulates;

> ***"The court may of its own motion or on the application of the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub rule (2) (3) (4) and (5) of this rule."***

In the case of ***Jamshed Ahmed Butt & another v Moses & 2 others [2013] eKLR*** this Court stated;

> ***"Rule 1 of Order VII (*** the predecessor to *Order 4 rule 1****) does not specifically give the court power to strike out a plaint where the breach is failure to aver in the plaint that there is no other suit pending and that there has been no previous proceedings."***

The respondents have conceded that the previous suit was withdrawn but their argument is that it was not disclosed. That said, from a reading of the ***Order 4 rule 1 (6) of the Civil Procedure Rules***, a failure to disclose that a previous suit was filed is not specified as one of the reasons upon which a court is entitled to strike out a suit. The reasons provided for striking out a suit are set out under ***sub-rule (2)*** where the plaint is not accompanied by a verifying affidavit, ***sub-rule (3)*** where there are several plaintiffs and the plaint is not accompanied by written authority for the plaintiff to act on their behalf, ***sub-rule (4)*** in the case of a corporation where no verifying affidavit sworn by an authorized official accompanies the plaint, or under ***sub-rule (5)*** where no verifying affidavit has accompanied a counterclaim.

In effect, there being no provision to strike out a suit where there has been a failure to disclose previous proceedings, we find that the court had no mandate to strike out the suit under the provisions of ***Order 4 rule 1 (f)*** of the ***Civil Procedure Rules.*** [GK4]

In sum, though the learned judge rightly struck out the appellants' representative action, he ought not to have struck out Martin Okoyo's suit on his own behalf, or the entire suit for the reasons that it did not disclose that previous proceedings had been filed.

Having found that the suit ought not to have been struck out, we now consider whether the learned judge misapprehended the appellants' dispute with the respondents, and in so doing, wrongly declined to grant the injunction sought. In this regard the learned judge stated thus;

> ***"So what is the plaintiff's case? The said application in my opinion is based on fear and apprehension. The 1st and 2nd respondents holds (sic) the land in trust for the plaintiffs together with others. There is no documentary evidence whatsoever that the 1st and 2nd defendants are acquiring the plaintiffs' parcel of land. The plaintiffs obviously have their civil leaders and if there is any such alienation they should be able to raise with their respective county councils. In the already alienated land, the Commissioner of Lands who is the person donated (sic) by law to lease out such trust land has apprehended his signature in the agreement dated 25th May 2004. I suppose therefore that in the event of such alienation again, the said office is said to be involved.***
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> ***The other issue which I am unable to comprehend is the situation of the land. The alleged 3700 Hactares was truly gazetted. It is not possible unless there is a survey report to ascertain from the pleadings where the plaintiffs' land starts and ends. If this court were to issue the prayers sought by the plaintiffs then it shall be a blanket order which shall affect other parties who necessarily are not part of this case."***

As we understand it, the question turns on the subject matter of the dispute between the appellants and the respondents, that is whether the dispute concerned the ungazetted portion occupied by the appellants and the members of the appellants' Society or whether, it concerned Dominion's Gazetted portion.

According to the Notice of Motion dated 7th October 2011, the appellants sought, i*nter alia*, orders for Dominion to be confined and restricted to the Gazetted portion pending the hearing and determination of the suit. When this is read in conjunction with Martin Okoyo's affidavit in support of the Motion, it was deponed;

> ***"12. THAT consequently a lease agreement between the 1st and 2nd Defendant in their capacity as Chief Trustees of all that land, covered by Yala Swamp and measuring 6900 hectares and on their own capacity as the local authorities, signed a lease with the 3rd defendant in regard to only 3700 hectares which is clearly demarcated vide Gazette Notice No. 2570 of 25th August 1970.***
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> ***13. THAT the remaining area of 3200 Hectares was never and has never been gazetted and is***

left to be farmed by the local farmers who include the Applicant/Plaintiff's and members of the Applicant/Plaintiff's Society which they have faithfully done upto the current date."

The 1st appellant then averred;

"28. THAT on the 30th day of August 2011, as if to confirm these suspicions, the 3rd Defendant/Respondent through its servants, agents or whatsoever descended on the farms of the Applicant /Plaintiffs and the members of the Applicant/Plaintiff's Society situated in the ungazetted area with bulldozers and other big earth moving machines and equipment and started the utter and horrible destruction of the farms consisting of crops that are growing. Some of the crops include maize, sukuma wiki, spinach, usuga/managu, potatoes, cassava, arrowroot, (nduma), sugarcane, passion fruits, bananas etc. Also some of the houses situated therein have been utterly destroyed and flattened…

32. THAT the 3rd Defendant /Respondent has no right or authority whatsoever to conduct any dealings on the ungazetted community land and to forcefully evict the Applicant/Plaintiff's and the members of the Applicant/Plaintiff's Society from their farms.

33. THAT the 3rd Defendant/Respondent is currently engaged in the process of wanton destruction of growing crops and pulling down houses on the ungazetted land and is continuing this process on a day by day basis and will continue doing the same unless the process is stopped by this Honourable Court."

From these excerpts, which we have taken the liberty to produce *in extenso*, it is evident that the area earmarked for farming by Dominion was the Gazetted portion. The ungazetted portion was yet to be assigned specific usage. It is this ungazetted portion that the appellants allege Dominion is intent on evicting them from, and taking into its possession. It is clear to us, that what was sought was an injunction order restraining the respondents from interfering with or evicting the appellants and members of the Society from the ungazetted portion, and not the Gazetted portion. Clearly, the learned judge misdirected himself by erroneously determining the application on the basis of the Gazetted portion when the appellants'

On account of the learned judge's misapprehension of the facts and the law in declining to exercise his discretion to grant injunctive relief to the appellants and the wrongful striking out of the appellants' suit, we find that we must interfere with the decision of the High Court dated 2nd November 2011 and allow the appeal. We accordingly set aside the decision of the High Court dated 2nd November 2011 and substitute therewith the following orders:

1. The 1st appellant's suit in ***HCCC No. 168 of 2011*** in his individual capacity is hereby reinstated;

2. The appellants' Notice of Motion dated 7th October 2011 is hereby allowed in terms of prayers 2,3,4, and 5 in[GK5] the result that Dominion is hereby restrained by a temporary injunction from accessing, trespassing, destroying, digging or in any other way interfering with the ungazetted portion[GK6] not being part of the Gazetted portion which is as demarcated by the boundaries specified by Gazette Notice No. 2570 dated 4th September, 1970 pending the hearing and determination of the suit ***HCCC No. 168 of 2011 by the High Court.***

3. Since the appellants have partially succeeded, we order that each party bears its own costs in the High Court, while the appellants shall have half of the costs in this appeal[GK7] .

It is so ordered.

Dated and delivered at Kisumu this 27th day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

[GK1]Appearing for the appellants?

[GK2]Also appearing for the appellants? Please cross check.

[GK3]Respectfully Judge, this seems to me to be the standard in an appeal where the lower courts findings of fact are challenged unlike here where I understand the complaint to be wrong exercise of discretion.

[GK4]There is no inherent power to do so? What do we make of Section 6 of the Civil Procedure Act?

[GK5]Please insert

[GK6]Please specify or set out the description of the parcel

[GK7]I think each party should bear its own costs of the appeal and of the High Court