IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 292 OF 2001

YIAPAS OLE SEESE ……..……………..…………....…… 1ST APPELLANT

JACKSON KIJANKO ………………….…………..…….. 2ND APPELLANT

SOLONKA OLE NAYIAHA ……….………….…...……… 3RD APPELLANT

SAMUEL OLE PARASHURU ……..………..…………. 4TH APPELLANT

MEOLI OLE KIRASI ………………...…...……………. 5TH APPELLANT

AND

SAKITA OLE NAROK ……………...……….....……… 1ST RESPONDENT

LEMOMO OLE NTENKESE ………..……………… 2ND RESPONDENT

TUPET OLE MURRE …………….……..…….…… 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kasanga Mulwa, J) dated 19th June, 2001

In

H.C.C.C. No. 233 of 2001)

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JUDGMENT OF THE COURT

This appeal is an example of the confusion which can ensue when proceedings start in a convoluted manner.

Yiapas Ole Seese, (1st appellant) , Jackson Kijanko (2nd appellant), Solonka Ole Nayiaha (3rd appellant), Samuel Ole Parashuru (4th appellant) and Meoli Ole Kirasi (5th appellant) commenced proceedings by plaint in the High Court at Nairobi, naming Sakita Ole Narok (1st respondent), Lemomo Ole Ntenkese (2nd respondent) and Tupet Ole Murre (3rd respondent) as the defendants, and indicated that they were suing these three on their own behalf and on behalf of all members of Batimaru Group Ranch. In effect theirs was a representative suit within the meaning of ***Order 1 rule 8 (1)*** of the Civil Procedure Rules.

The appellants realized this and on 13th February, 2001, they brought an application by chamber summons under the aforesaid rule and ***section 3A*** of the Civil Procedure Act. Problems in their suit started when they included prayers in that application which, prima facie, are not within the ambit of that provision. The prayers were as follows:-

"(1) Service of this application be dispensed within the first instance.

(2) The plaintiffs do have leave of this Honourable Court to give notice of the institution of this suit to all persons on whose behalf and for whose benefit they have instituted the suit, by public advertisement in one of the local daily newspapers.

(3) An order to issue compelling the Defendants to execute all the transfers or other documents of Titles No. Kajiado/Lorngorsua/966 to Kajiado/Lorngorsua/1415 in favour of the plaintiffs.

(4) IN THE ALTRNATIVE: The Deputy Registrar be directed to execute all the transfers and/or other documents for Kajiado/Lorngorsua/966 to Kajiado /Lorngorsua/1415 in lieu of all the officials of Batimaru Group Ranch and the Land Registry, Kajiado District to register the transfers and issue Title Deeds to the plaintiffs on payment of the relevant charges.

(5) The Honourable Court be pleased to set a time limit within which the defendants must comply with the court order."

The named defendants are described in the plaint as livestock farmers on Batimaru Group Ranch and that "*at all material times elected and registered as the Chairman, Secretary and the Treasurer of the Group Ranch*.", the then registered title holder of land parcel No. Kajiado/Lorngorsua/63 measuring 19,644 hectares. The membership of the said Group Ranch is said to be about 450 members. Considering the manner in which the plaint was instituted, it suggests that the appellants instituted the suit on their own behalf and on behalf of all those 450 members, of course excluding the named defendants, the 1st to 3rd respondents herein. If that be so then it was proper that an application under ***rule 8 (1)*** of the Civil Procedure Rules, was brought for each of those members to be notified of the existence of the suit.

Order 1 rule 8 (1) provides as follows:

"8 (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested."

Up to the time the plaint was filed the appellants were perfectly entitled to file a plaint in a representative capacity if in their own mind they were satisfied their cause of action and those of the persons on whose behalf they instituted the suit were the same. Likewise they were perfectly entitled to bring an application pursuant to ***rule 8*** aforesaid. However, we do not think leave was properly applied for under ***sub-rule (1),*** as the appellants did, as that sub-rule does not say anything about notice to the parties represented. The correct provision was ***rule 8 (2)*** which provides that:-

"8 (2) The court shall in such a case direct the plaintiff to give notice of the institution 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."

That provision is worded in mandatory terms and places the duty squarely on the court to direct the issuance of a notice to the person or persons represented in the suit. Mulla on The Code of Civil Procedure, 16th Ed. Vol. 2 page 1522, states that:-

"A representative suit is one which is filed by one or more persons under this rule (i.e. Order 1 rule 8 (2) of the Indian Code of Civil Procedure, materially the same as ours) on behalf of themselves and others having the same interest … However if the suit is under Order 1 rule 8 , the provisions of rule

8 must be strictly complied with; Otherwise, a subsequent suit will not be barred."

And at page, 1534 the learned authors have authoritatively stated as follows:-

"When a decree is passed in a representative suit, without complying with the requirements of this rule the proper order to pass is to set it aside and to direct the case to be proceeded in accordance with law."

What happened in our case? Mulwa, J became seised of the appellants' application, which as we said earlier was expressed to be brought under ***Order 1 rule 8 (1)*** and ***section 3A***; on 14th March 2001. Mr. Weda, for the appellants, prosecuted the application. One "Makloo" is shown as having appeared for the respondents, the named defendants in the plaint. Then Mr. Weda is recorded as having told the Judge that they had a consent to record. Whereupon the court made the following order:-

"COURT:

By consent the application dated 31.1.2001 be and is hereby allowed in the following terms.

1. Plaintiffs are granted leave to give notice of institution of this suit to all persons and for whose benefit they have instituted the suit by publishing in one of the daily newspapers.

2. Deputy Registrar of this court is directed to execute all the transfers and all other documents for Kajiado/Lorngorsua/966 to Kajiado/lorngorsua/1415. In view of all the officials of Batimaru Group Ranch and the Land Registrar Kajiado District to register the transfers and issue title deeds to the plaintiff (sic) on payment of the relevant charges.

Costs in cause.

Kasanga Mulwa

Judge"

It is instructive that the prayers in the plaint dated 31st January, 2001 which was the same date of the chamber summons aforesaid, were in effect the same. So the effect of the above quoted order was that the suit was finally determined except the issue of the costs of the suit. So even if the notice under ***Order 1*** **rule 8 (2)** of the Civil Procedure rules was issued and served, it would serve no purpose as the appellants had got what they were seeking in their suit.

The matter did not, however, end there. Although the notice of the institution of this suit had not been published by 23rd March, 2001, somehow some members of the Bartimaru Group Ranch came to know of the suit and that an order had been made which was adverse to them. Consequently, one of them took out a motion on notice dated 22nd March 2001 and lodged the same in court the next day seeking among other orders, an order that the Group Ranch and David Sopon Mbati (the only applicants) be joined in the suit as the 4th and 5th defendants; that all the names of the named defendants be struck out and that the consent order made on 14th March, 2001 be reviewed, varied, set aside and or be discharged.

Among the grounds proffered for the application were, that the named defendants had no ***locus standi*** to be sued on behalf of the group ranch, they were colluding with the plaintiffs to achieve a disproportionate sub-division of land belonging to the Group Ranch, there was a previously instituted suit relating to that land which the named parties to the present suit were aware of and which they failed to disclose and that the Group having not been dissolved, it was improper to proceed as though it had ceased to exist.

The first appellant filed a replying affidavit to that motion in which, on the main, he deposed that as parcel No. Kajiado/Lorngorsua/63, had been sub-divided and a few members issued with titles to some

of the resulting sub-divisions, the parcel of land ceased to exist in its original form and the sub-division had the effect of dissolving the Group Ranch which was originally the registered owner. Secondly, that the previous suit to wit Nairobi High Court Civil Case No. 561 of 2000, concerned parcel No. 63 which parcel of land was no longer in existence, and besides that at the time of instituting this suit he was unaware of the existence of the earlier suit.

Mulwa, J heard the motion. Three main issues were canvassed before him. First, whether the Group Ranch was still in existence as a corporate body. Secondly, whether the order of 14th March, 2001 was made ex parte or otherwise. Thirdly, whether the appellants knowingly failed to disclose a material fact, namely the previously instituted suit concerning parcel No. 63. The learned Judge in his ruling held that both applicants demonstratively satisfied him that they should be joined as defendants. Furthermore, that all the preconditions for the dissolution of a Group Ranch had not been satisfied and therefore the Group Ranch was still in existence as a corporate body. In his view, if the Group Ranch was still in existence the appellants could not properly sue on behalf of members of the Group but in their own behalf only. He then proceeded to order that ".. *the plaintiffs herein cannot sue on behalf of the Group Ranch but on their own behalf as members as they are not Group Representatives of the Group."*

The learned Judge then proceeded to rule, citing with approval the words of Warrington L.J, in the old English case of ***R* V. KENSINGTON INCOME TAX COMMISSIONERS** for the District of Kessington, ex parte Princess De Polignae (1917) 1 KB 486, C.A), that the appellant had failed to disclose the existence of Civil case No. 561 of 2000, and thereby misled the court. On that ground alone the learned Judge set aside the order of 14th March, 2001, and thus provoked this appeal.

Three main issues were canvassed in the appeal. First, whether the Order of 14th March, 2001 was ex parte. Second, whether land parcel No. 63 was still in existence. Third, whether there was material non-disclosure of the existence of Civil Case No. 561 of 2000.

We earlier discussed the provisions of ***Order 1 rule 8*** of the Civil Procedure Rules. Mr. Weda conceded both before Mulwa, J and before us that the appellant did not publish a notice to notify all persons for whose benefit they had filed the suit of its institution. He, however, argued that the failure to publish the notice did not divest the trial Judge of jurisdiction to make the order of 14th March, 2001. In his view because all the parties named in the suit were present and consented to its making the order was proper and therefore the learned Judge improperly vacated it.

Mr. Kaluu appeared for the respondents in the appeal. He invited us to affirm the decision of Mulwa, J vacating the order of 14th March, 2001. In his view the Batimaru Group Ranch will not be dissolved until all the sub-divisions of parcel No. 63 have been transferred to its members. It was further his view, that the order of 14th March, 2001 having been made before notices under ***Order 1 rule 8 (2)***, had been published, was for that reason an ex parte order. It was conditional on notices under that order being given.

The second limb of Mr. Kaluu's submissions before us was with regard to the failure by the appellants to disclose the existence of High Court Civil Case No. 561 of 2000. It was his view that the failure by the appellants to disclose the existence of the suit was evidence of the lack of good faith on their part. There is a dispute as to whether or not the appellants were aware of the existence of the previously instituted suit. We have inadequate evidence to make a final decision on it. Consequently, in view of the decision we have come to regarding the appeal, which we will give shortly hereafter, we find no basis for belabouring the point.

This is an interlocutory appeal. We are conscious of the fact that care need to be exercised to avoid encroaching on the jurisdiction of the bench that will eventually hear the appellants' case in the High Court.

It was common ground that ***Order 1 Rule 8 (2)*** of the Civil Procedure Rules has not been complied with. It is a mandatory legal requirement . The appellants are obliged to comply with it before they can

competently proceed with their case in the High Court. The whole purpose of the provisions of ***Order 1 rule 8*** is to ensure that all persons with unlitigated similar cause of action who are desirous of having their cause determined are included in the suit for their own convenience and to obviate a multiplicity of suits. Hence, the need to notify them of the institution of the suit so that in case any of them wishes to take part he is given the opportunity to do so.

In our case, the opportunity to participate was denied when the order of 14th March, 2007 was made. That explains why the authors of Mulla, on The Indian Code of Civil Procedure, in the passage we earlier quoted, state that an order made before complying with ***Order 1 rule 8 (2)*** entitles the person aggrieved to an order setting aside the orders, as of right.

The expression ex parte is commonly used in adversarial proceedings to connote a situation where judicial proceedings are held in the presence of one party in the dispute and in absence of the other . In Jowitt's Dictionary of English law, Vol. 1 at P. 744 , it is stated that:-

"In its more usual sense, ex parte means that an application is made by one party to a proceeding in the absence of the other."

But the situation in our case is different.Those who were absent when the order of 14th March, 2001 was made were not adversaries, but some of the people for whose benefit the suit was filed. This is a unique case. Until notices under Order ***1 rule 8*** , Civil Procedure Rules, are served, one may not know whether or not they will accept being treated as plaintiffs. Service of the notice as we stated earlier, is to give them an opportunity to make an election whether or not to become parties. It is our view, and we so hold, that if any step is taken in the proceedings before they are given an opportunity to make the election, those proceedings, in such special circumstances, will be treated as ex parte. That is why in our view the authors of Mulla, say the person aggrieved is entitled to an order setting aside the order made in his absence.

We have said enough to show that this appeal is for dismissal. We find no necessity of dealing with the issue whether or not parcel No. 63 is still in existence. That is one of the main issues in the suit, and as we stated earlier we must avoid the temptation of commenting on aspects of the case which are in actual fact within the province of the trial court.

In the result and for the foregoing reasons, this appeal fails and we order it dismissed with costs to the respondents in the appeal.

Dated and delivered at Nairobi this 6th day of June, 2008

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.