



**Active Environmental Team v The National Land Commission & 2 others
(Petition 27 of 2021) [2024] KEELC 5727 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 27 OF 2021
FM NJOROGE, J
JULY 31, 2024**

BETWEEN

ACTIVE ENVIRONMENTAL TEAM PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER 2ND RESPONDENT

GIRITU RANCHING (DA) COMPANY LIMITED 3RD RESPONDENT

RULING

1. This Ruling is in respect of the Notice of Motion Application dated 12th June, 2023 by the Counsel for the 3rd respondent/Applicant and it is brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), which sought the following orders:

1.Spent
2. That this application be heard before any other application;
3. That the Petition and the cross-petition herein be struck out with costs;
4. That costs of this application be provided for.

2. The application is premised on the grounds at its foot and is supported by the annexed affidavit of Richard Otara, an advocate of the High Court representing the 3rd respondent which reiterates the said grounds which are as follows:

1. .. That the Petitioner herein is incapable to sue;
2. That a CBO can only sue through its officials and as such there is no Petitioner in this Petition;



3. That Active Environmental Team which is a community based organization lacks the capacity to sue in its names;
 4. That it would be fair, just and reasonable that the Petition herein and subsequently the cross-petition be struck out with costs.
3. The motion is not opposed by the 1st respondent in the main petition. However, the 2nd respondent in the main petition filed a sworn replying affidavit of Dhadho Gaddae Godhana dated 27/6/2023. In that affidavit the deponent stated that he is the governor of Tana River County; that Article 22(2) (D) of *the constitution* provides that an association can sue on behalf of its members; that Article 260 of *the Constitution* defines persons to include associations and bodies, whether incorporated or otherwise; that a self-help group may sue; that if an issue arises as to capacity then amendment can be ordered; that the dismissal of the petition should not affect the cross-petition which has been properly filed according to him and that failure to consider the cross petition would violate the 2nd respondent's right to a fair trial.
 4. The petitioner opposed the application vide the sworn affidavit of Benson Wemali, its member. He deponed that the petitioner is involved in advocating for redress of historical injustices and environmental health; that the deponent is an appointed environmental inspector; he reiterated the averments of the 2nd respondent with regard to Article 22(2) and Article 260 of *the Constitution* to the effect that an association can sue on behalf of its members and stated that that a Community Based Organization is a legal entity with legal capacity to so sue; that a self-help group can file public interest litigation; that amendments can be ordered if any issue arises; that the application has been brought in bad faith considering that the 3rd respondent had informed the court that a consent had been reached between the parties and a draft consent filed and that the suit property is public land and there is need to have the petition heard and determined on its merits.
 5. The 3rd respondent later on filed a supplementary affidavit sworn by one Buya Wario Mwaini. The deponent stated that then provisions of *the Constitution* cited by the respondents do not except associations from litigating through the names of their officials, and that persons in Article 260 refers to artificial persons who are body corporates. It is further deponed that once the petition is dismissed the cross-petition should also fall and that there is nothing that prevents the 2nd respondent from filing its own petition.
 6. The application was ordered to be disposed of by way of written submissions. the 3rd respondent/ applicant filed submissions on 22/2/2024; the 2nd respondent filed submissions dated 9/5/2024 and the petitioner filed its submissions on dated 2/5/2024.
 7. I have considered the application, the reply and the filed submissions.
 8. The issue that arises is whether the petition ought to be dismissed for want of capacity on the part of the petitioner, and, if it is so dismissed, the cross-petition should also fall.
 9. It is the correct position that Article 22 of *the constitution* envisages that all persons are at liberty to institute proceedings for violations of their constitutional rights. The provisions read as follows verbatim:

“Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.”



10. Under Article 260 the word “person” is said to “include a company, association or other body of persons whether incorporated or unincorporated.”
11. The petitioner describes itself in the preamble to the petition as:
- “...a community based organization registered as a self-help group of non-profit nature whose work revolves around historical land injustices, environmental health protection and communal rights to use of land and natural resources.”
12. There is no doubt then that the petitioner falls within the definition of the word “person” in Article 260 of *the constitution*.
13. It is however clear that the petitioner is an unincorporated entity. The applicant cites the renowned case of *Kipsiwo Community Self Help Group Vs the Attorney General & 6 Others – Eldoret Petition No 9 Of 2013, Kituo Cha Sharia Vs John Ndirangu Kariuki & Another and Dennis Olooihero & 2 Others V The Art Of Ventures Ltd & 2 others* Nairobi HCCC 1358 of 2005 (2006) eKLR where the courts found that the entities suing were not entitled to bring the proceedings in their own names, but that they could only litigate under the names of their officials suing on their behalf.
14. In *Daniel Nzioki Kiangi & 2 others v Priscilla Musili Mulwa, Mutuku Kimantbi, Mueni Kikuswi (Suing on their Own Behalf and on Behalf of 47 Members of Meka Self Help Group)* [2021] eKLR the court stated as follows:
- “73. I have no doubt in my mind that officials of unincorporated group may sue and be sued through their officials in a matter concerning their joint interest pursuant to the above provision.”
15. In *Eritrea Orthodox Church vs. Wariwax Generation Ltd.* [2007] eKLR where the Court held as follows:
- “There is no doubt that the plaintiff is non-incorporated body of many members registered under the *Societies Act*, Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of *Civil Procedure Rules*.”
16. On the basis of the case law and legal provisions set out above I fully agree with the 3rd respondent regarding the point made to the effect that the petitioner can only sue through its officials. In the Kipsiwo Case (supra) the court wrestled with the issue of whether the case ought to fail on that ground and citing *Kituo Cha Sharia vs John Ndirangu Kariuki & Another* (supra), stated as follows:
- “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.....

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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.”
17. If the petition cannot be heard and determined as it is, can there be an amendment to cure the defect? The respondents to the application, in recognition of the issue at hand, have emphasized that amendment is possible. The court in Kipsiwo supra recognized the right of parties to amend their petition under Rule 18 of *the Constitution* of Kenya, (*Protection of Rights and Fundamental Rights Practice and Procedure Rules*, 2013.
18. That rule states 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.”
19. In *Officials of Mission in Action Nakuru Baby Ophanage v Rigiri & 3 others (Environment & Land Case E34 of 2023)* [2023] KEELC 21021 (KLR) (26 October 2023) (Ruling) the court, under similar circumstances as those of this case, ruled that the plaintiffs may amend its plaint to include its officials.
20. In *Daniel Nzioki Kiangi & 2 others v Priscilla Musili Mulwa, Mutuku Kimanthi, Mueni Kikuswi (Suing on their Own Behalf and on Behalf of 47 Members of Meka Self Help Group)* [2021] eKLR the court declined to entertain the issue of capacity at an appellate stage on the grounds such as those raised in the present petition. The issue has been raised in this case at the original jurisdiction stage and there is need to correct the anomaly.
21. In the light of the foregoing, I am inclined to find that the mistake that the petitioner has made is not fatal to the petition the objection having been raised at this early stage, and it may be allowed to amend its petition. Consequently, I disallow the application dated 12th June, 2023 and I order as follows:



- a. The petitioner shall amend its petition within 21 days and name its officials as suing on its behalf;
- b. The costs of the present application shall be borne by the petitioner;
- c. The petition shall be mentioned on 16/10/2024 to confirm compliance.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31ST DAY OF JULY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

