



**Omito (Trading as Ingusi Company, Formerly known as Opwoko Nanzala and Company) v Kweyu & another (Environment and Land Appeal E054 of 2021) [2024] KEELC 5371 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5371 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E054 OF 2021**

**DO OHUNGO, J**

**JULY 22, 2024**

**BETWEEN**

**CLEMENT OMITO (TRADING AS INGUSI COMPANY, FORMERLY KNOWN AS OPWOKO NANZALA AND COMPANY) ..... APPELLANT**

**AND**

**SILAS ONGULO KWEYU ..... 1<sup>ST</sup> RESPONDENT**

**CATHERINE AUMA OKOTI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. W. K. Cheruiyot, Senior Resident Magistrate) delivered on 26th November 2021 in Mumias MCELC No. 115 of 2018)*

**JUDGMENT**

1. Litigation leading to this appeal started in the High Court at Kakamega on 27<sup>th</sup> September 2006 when the Appellant herein and Wilson Wambutsi (both trading as Ingusi Company, formerly known as Opwoko Nanzala and Company) jointly filed their Complaint dated 25<sup>th</sup> September 2006, against Silas Kweyu Shuji. The said complaint was later replaced with Amended Complaint amended on 9<sup>th</sup> February 2011.
2. In the Amended Complaint, the First and Second Respondents herein were named as First and Second Defendants, respectively. The Plaintiffs averred in the Amended Complaint that they were the proprietors of a firm known as Ingusi Company, formerly known as Opwoko Nanzala and Company, which firm was the registered proprietor of the parcel of land known as South Wanga/Shikalame/951 (the suit property). That they farmed sugarcane on the suit property and earned an annual income of approximately KShs 250,000. That the First Respondent trespassed onto the suit property in January 1997 and that the Respondents fraudulently transferred the suit property to their names on 23<sup>rd</sup> January 2009.



3. The Plaintiffs therefore prayed for judgment against the Respondents jointly and severally for:
  - a) An eviction order and/or vacant possession.
    - a) (i) An order for the rectification of the register by the cancellation of entries Nos. 8 and 9 of 23<sup>rd</sup> January, 2009 transferring the property comprised in Title No. South Wanga/Shikalame/951 to Silas Ongulo Kweyu and Catherine Auma Okoti and the cancellation of the Title Deed issued to the Defendants on 12<sup>th</sup> February, 2009.
    - b) Mesne Profits
    - c) Costs and interest on (b) above.
4. Prior to the filing of the Amended Complaint, the First Respondent filed a defence and counterclaim on 16<sup>th</sup> January 2007 through which he denied both the allegations of proprietorship and trespass. He averred that he had been in occupation of the suit property for 12 years prior to 1997 and that he had acquired title thereto by adverse possession. He prayed that the Plaintiffs' case be dismissed and that the suit property be registered in his favour by virtue of adverse possession.
5. After the filing of the Amended Complaint, the Second Respondent filed a defence through which she denied the Plaintiffs' allegations of proprietorship and trespass. She further averred that the registration in the Respondents' favour was done lawfully and urged the Court to dismiss the Plaintiffs' suit with costs.
6. The suit was later transferred to this Court, and thereafter to the Subordinate Court, for hearing and determination. It fell upon Hon. W. K. Cheruiyot, Senior Resident Magistrate, to hear and determine the case. Upon doing so, he delivered judgment on 26<sup>th</sup> November 2021. He held that the Plaintiffs lacked capacity to file the suit and proceeded to dismiss the suit with costs.
7. Aggrieved with the outcome, the Appellant filed this appeal on 8<sup>th</sup> December 2021, through Memorandum of Appeal dated 7<sup>th</sup> December 2021. He prayed that the judgment of the Subordinate Court be set aside and be replaced with orders allowing his case with costs and dismissing the First Respondent's counterclaim with costs.
8. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
  1. The trial Magistrate erred in law and fact in dismissing the Appellant's suit upon an issue which was neither pleaded nor canvassed before him, namely that the Appellant's suit was a representative suit which the Appellant required authority to institute.
  2. The trial Magistrate erred in law and fact in failing to appreciate, sufficiently or at all, the difference between a representative suit and a suit by or against firms and persons carrying out business in names other than their own, as separately provided for under Order 1 Rule 13 and Order 30 Rules 1 and 9 of the Civil Procedure Rules, 2010, respectively.
  3. The trial Magistrate erred in law and fact in finding and holding that Ingusi Company, a business firm registered under the Business Names Act, Cap 499



Laws of Kenya cannot sue in its name or in the names of its proprietors, as the Appellant had done.

4. The trial Magistrate erred in law and fact in finding that the name of the Appellant did not appear in the list of names of proprietors of Ingusi Company, yet the evidence on record confirmed that the Appellant, who is also known as Clement Lukoko, was one of the proprietors of the firm known as Ingusi Company, formerly known as Opwoko Nanzala and Company, and there was also evidence on record showing that the Appellant had in fact been previously sued by the person from whom the Respondents obtained the impugned title to the suit property in the same name of Clement Omito and in the same capacity as one of the proprietors of Opwoko Nanzala and Company which had changed its name to Ingusi Company.
5. The trial Magistrate erred in law and fact in failing to allow the Appellant's claim, and further erred in dismissing the Appellant's suit on the basis of a wrong and/or erroneous interpretation of a point of law which he raised on his own and which he did not give the Appellant an opportunity to address.
6. The trial Magistrate erred in law and fact in failing to consider and decide the case before him on the merits and on the basis of the pleadings and evidence tendered before him.
7. The trial Magistrate erred in law and fact in failing to find and hold that the Respondents had obtained registration of the suit property in their joint names fraudulently and the fraudulent registration, and the resultant title deed issued to the Respondents, were null and void and liable to be cancelled and the register rectified accordingly.
8. The trial magistrate erred in law and fact in failing to award the Appellant damages for trespass and/or mesne profits to compensate the Appellant for the loss and damage the Appellant had suffered and continued to suffer for the period the Appellant and the other proprietors of Ingusi Company had been unable to use the suit property because of the Respondents' acts of trespass.
9. The trial Magistrate erred in law and fact in failing to assess the damages he would have awarded to the Appellant if he had allowed the Appellant's claim, as he ought to have done.
10. The trial Magistrate erred in law and fact in failing to decide on and/or make an order dismissing the 1<sup>st</sup> Respondent's counterclaim dated and filed in court on 16<sup>th</sup> January, 2007, with costs.
11. The trial Magistrate erred in law and fact in preparing and delivering a judgement which did not comply with requirements of Order 21 Rules 1, 4 and 5 of the Civil Procedure Rules, 2010.
12. The trial Magistrate erred in law and fact in failing to write and deliver a good judgement, and further erred in law by delaying delivery of the judgement from 16 August, 2021 to 26<sup>th</sup> November, 2021, without recording or offering any reason(s) for the inordinate delay.



9. The appeal was canvassed through written submissions. The Appellant filed submissions dated 5<sup>th</sup> June 2023, wherein he argued his grounds of appeal in three clusters: Grounds 1, 2, 3, 4, 5 and 11 under the first cluster; Grounds 6, 7, 10 and 12 under the second cluster and finally, Grounds 1, 2, 3, 4, 5 and 11 under the last cluster.
10. Under the first cluster, the Appellant argued that the learned Magistrate did not deliver a judgement which complies with the requirements of Order 21 Rule 4 of the Civil Procedure Rules and that the judgement dealt only with a point of law, namely, how a business name registered under the Registration of Business Names Act Cap. 499 can sue or be sued. That the learned Magistrate raised the said point of law suo moto since it was neither pleaded by the Respondents in their defences nor canvassed by the parties. That the suit before the learned Magistrate was not a representative suit but a suit filed by two of the registered partners of Ingusi Company, a company duly registered under the Registration of Business Names Act Cap. 499.
11. That at the time of filing the suit, the Plaintiffs were the only surviving partners of Ingusi Company and that they were therefore entitled to file the suit in the manner they had done, pursuant to Order 30 Rule 1 of the Civil Procedure Rules. Further, that the Appellant testified during the trial that Wilson Wambutsi, the Second Plaintiff, who was alive during the filing of the suit, had passed away as of the time of trial. That in those circumstances, the learned Magistrate erred in holding that what was before him was a representative suit. He relied on the cases of *Mehul Nemchand Haria v Hombe Saw Mills & another* [2013] eKLR and *Mungai & Others v John Wainaina & 8 others* [2014] eKLR in support of those arguments.
12. In regard to the second cluster of grounds, the Appellant argued that the suit having been fully heard, it was the responsibility of the learned Magistrate under Order 21 Rules 4 and 5 of the Civil Procedure Rules to render a well-reasoned judgement covering all the issues that arose. That instead, the learned Magistrate raised only one issue suo moto, as to whether the suit was a representative suit, and proceeded to erroneously dismiss the suit on that single ground. That the judgement and decree given by the High Court given in *Kakamega H.C.C. No. 18 of 2008* having been tendered before the learned Magistrate, the Subordinate Court should have granted all the prayers that the Appellant had sought in the Amended Plaint.
13. Finally, under the last cluster, the Appellant argued that the learned Magistrate erred in not saying anything about the Appellant's claim for mesne profits and that it was incumbent upon the Subordinate Court, even if it dismissed the claim for mesne profits, to state in the judgement the amount it would have awarded to the Appellant if the claim for mesne profits had succeeded. That considering the duration of trespass and the fact that the Appellant was wrongfully stopped from using the suit property to grow sugarcane on it, an award to the Appellant of mesne profits of KShs 6 million would have been fair and reasonable in the circumstances.
14. The Appellant concluded by urging this Court to allow the appeal and to determine the suit as opposed to referring the matter back to the Subordinate Court. He relied on the cases of *South C Fruit Shop Limited v Housing Finance Company of Kenya Limited* [2013] eKLR and *Muhidin Sheikh Mohamed vs Khadija Omar Al-Amin* [1997] eKLR in support of that approach.
15. The First Respondent filed submissions dated 23<sup>rd</sup> November 2023. He argued that from the pleadings and evidence on record, the Appellant's identity was not clear since he indicated his name in his pleadings as Clement Omito while during his testimony on 15<sup>th</sup> March 2021, he stated his name as Clement Omito Omito. Further, that during his cross examination on 17<sup>th</sup> May 2021, he told the Subordinate Court that his name was Clement Lukoko and further admitted that the name Clement Omito Omito is different from Clement Lukoko. That with that inconsistency, it was not



clear whether the Appellant brought the suit in a representative capacity or as a proprietor of Ingusi Company.

16. The First Respondent further argued that although the Appellant spent all his time, in his documents and submissions, explaining to the Court that there had been previous court cases with different decisions, none of the cases involved the Respondents and the Appellant. That when the suit leading to this appeal was filed, Alfred Kweyu who the Appellant claim had obtained title to the suit property fraudulently, was alive but the Appellant elected not to join him in the suit. That the failure to join Alfred Kweyu was fatal to the suit. In conclusion, the First Respondent argued that the authorities cited by the Appellant are not relevant to the appeal and urged the Court to dismiss the appeal with costs.
17. The Appellant filed submissions in response, dated 31<sup>st</sup> May 2024. He argued the Appellant's name was never an issue for determination before the Subordinate Court and that the said Court did not deal with it in its judgment. That, consequently, the issue was raised in this appeal as an afterthought. That the decree in HCCC No 18 of 2008 could not be executed against the Respondents since the Respondents were not parties to the said case, and owing to the fact that the Respondents, acting in concert with Alfred Kweyu, transferred the suit property to themselves during pendency of HCCC No 18 of 2008. The Appellant also argued that Alfred Kweyu was not a necessary party after he fraudulently transferred the suit property to the Respondents and that failure to join him was not fatal. He also relied on Order 1 Rule 9 of the Civil Procedure Rules.
18. The Second Respondent did not file any submissions despite being given opportunities to do so.
19. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
20. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the suit was a representative suit and if I find that the appeal is meritorious, whether to remit the suit to the Subordinate Court.
21. Was the suit a representative suit? The learned Magistrate resolved the matter thus:

For a start, the suit was filed by the two plaintiffs on behalf of members of INGUSI COMPANY. The said entity is a business name registered under the Business Names Act.

A letter produced by the plaintiff from the registrar of Companies indicates that INGUSI company is registered as a business name and has 20 members.

How does such an organization sue or be sued? The same can not (sic) sue in its name. all (sic) the members can either file a joint suit or members can give consent to some of the members to sue on their behalf. The plaintiff herein in cross examination testified that there is no written (sic) consent given to him by the members.

In my opinion, the plaintiffs filed this suit as a representative suit. They must lay basis of such authority. Without such basis, it will be deemed that the plaintiffs are suing on their own behalf and for their benefit.



The plaintiff should have sought authority to do so from their members and have such a consent from each of the members. This was not done and is fatal to the suit. The plaintiffs did not demonstrate capacity and locus to sue on behalf of members of INGUSI COMPANY.

Secondly, according to the list of names of the proprietors of INGUSI COMPANY, the name of the 1<sup>st</sup> plaintiff, who is the only surviving plaintiff is not indicated. The name indicated is CLEMENT LUKOKO. The plaintiff in this suit goes by the name CLEMENT OMITO. He told the court the names in his National identity card is CLEMENT OMBITO OMBITO. He did not describe himself in the suit papers to be also known as CLEMENT LUKOKO. These look like separate and distinct people.

For the above reason alone, I find that the plaintiff lacked capacity to file this suit for lack of consent from members of the said Business name and renders a big blow to the suit. Capacity to sue is a serious integral part of the suit.

I shall therefore dismiss the plaintiffs suit with costs.

22. A representative suit refers to legal proceedings where a representative plaintiff, acting on behalf of a larger group, brings a suit to assert the rights or interests of that group. The converse may also happen: a representative Defendant may be sued on behalf of a larger group.
23. Pursuant to Order 1 Rule 1 of the Civil Procedure Rules, “All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”
24. Further, Order 1 Rule 8 of the Civil Procedure Rules provides:  
One person may sue or defend on behalf of all in same interest
  - (1) 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.
  - (2) 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.
  - (3) 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.
25. The Court of Appeal described a representative suit in *Sombo & 4 others (Suing on behalf of 15,000 individuals of the [Amwezi and Mirima Clans of the Duruma Community\) v Nyari Investment \(1998\) Ltd & 5 others \(Civil Appeal 23 of 2018\)](#) [2023] KECA 438 (KLR) (14 April 2023) (Judgment) (with dissent - SG Kairu, JA) as follows:*

In a representative suit ... a person or group of persons are authorised to bring the suit on behalf of a larger group, who have common legal and factual questions they seek to advance in a claim or defence, and for this reason the law imposes a number of special procedural requirements, including demonstration of the authority in writing to appear for the other members of the group, which is found in Order 1 Rule 13 of the Civil Procedure Rules of 2010.



26. In *Kivure & 8 others (Suing on their behalf and on behalf of 4201 Members of Kishamba B Group Ranch) v Mwakina & 28 others (Civil Appeal 52 of 2020)* [2023] KECA 445 (KLR) (14 April 2023) (Judgment), the Court of Appeal emphasised the importance of giving notice of institution of a representative suit to all affected persons. The Court stated:

Order 1 Rule 8 is quite clear that for a representative suit there has to be notice to all those affected by either personal service or by way of public advertisement, as the court may direct. This requirement is mandatory.

27. Thus, to ascertain whether a suit is a representative one, the first port of call is the plaint, which must be perused to determine whether the Plaintiff has brought the suit to assert the rights or interests of a larger group.

28. A perusal of the Amended Plaint amended on 9<sup>th</sup> February 2011 reveals that the Plaintiffs described themselves in the heading thereof as “both trading as Ingusi Company, formerly known as Opwoko Nanzala and Company.” The Plaintiffs averred within the body of the Amended Plaint that they were the proprietors of a firm known as Ingusi Company, formerly known as Opwoko Nanzala and Company, which firm was the registered proprietor of the suit property. They also averred that the First Respondent trespassed onto the suit property in January 1997 and that the Respondents fraudulently transferred the suit property to their names on 23<sup>rd</sup> January 2009.

29. The Plaintiffs did not aver in their Amended Plaint that they had filed the suit on behalf of members of Ingusi Company or any other person. There was absolutely no indication in the Amended Plaint that they had brought the suit for the benefit of some other person. Needless to state, whether their claim had any merit is a matter that would have to be demonstrated separately.

30. The Plaintiffs’ case was that Ingusi Company, formerly known as Opwoko Nanzala and Company, was a business name registered under the Registration of Business Names Act Cap. 499 and that they were partners in the said business. Pursuant to Order 30 Rule 1 of the Civil Procedure Rules, any two or more persons claiming as partners and carrying on business in Kenya may sue in the name of the firm in which they were partners at the time of the accruing of the cause of action. Such a suit does not become a representative suit merely because only a few of the partners have filed it.

31. Regarding the First Respondent’s arguments that inconsistencies in the Appellant’s identity make it unclear whether the Appellant brought the suit in a representative capacity or as a proprietor of Ingusi Company, suffice it to state that inconsistency in a litigant’s name does not make a suit a representative one. For a suit to be representative, the intention to represent a larger group must be manifest in the plaint. If a litigant shares common legal and factual issues with other persons, but nevertheless moves the court without involving others, the suit does not thereby become a representative suit.

32. I agree with the Appellant that theirs was not a representative suit, but a suit filed by some of the partners of Ingusi Company. The learned Magistrate erred in holding that the suit was a representative suit and proceeding to dismiss the suit on that sole issue. I find merit in this appeal.

33. That said, I am aware that material was availed before the Subordinate Court showing that Ingusi Company had as many as 20 partners. The Appellant claimed that they had all passed away, including Wilson Wambutsi, his co-plaintiff. The Appellant will have to incorporate the interests of the estates of all deceased partners in any legal pursuits concerning the suit property. If he does not, the trial court will determine what to make of that situation.

34. The Appellant urged this Court to determine the suit as opposed to referring the matter back to the Subordinate Court. I am not inclined to take that route for two reasons.



35. Firstly, the Subordinate Court has not made any determination on the merits or otherwise of the Plaintiffs' case. The case was dismissed purely on a technicality. The Appellant is well aware of that since in his arguments in this appeal, he faulted the Subordinate Court for failing to render a well-reasoned judgement covering all the issues that arose, as is required by Order 21 Rules 4 and 5 of the Civil Procedure Rules. He also faulted the trial Court for not determining the quantum of mesne profits. All that is confirmation that the substance of the Plaintiffs' case is yet to be determined.
36. Secondly, if I were to proceed and determine the suit, I would deprive the parties of an opportunity to appeal to this Court against the judgment. In essence, I would put the parties in a situation that only leaves them with an opportunity for a second appeal, complete with the constraint under Sections 79D and 72 of the *Civil Procedure Act* that such an appeal is limited to questions of law only. The right of appeal is a central part of the right to a fair hearing and access to justice. I am not persuaded that I should deprive parties of those cardinal rights in the interest of expediency.
37. In the result, I allow this appeal and set aside the judgment of the Subordinate Court. The suit before the Subordinate Court shall be heard afresh by a Magistrate other than Hon. W. K. Cheruiyot. Each party to bear own costs of the appeal.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF JULY 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Bibiu holding brief for Mr Amuga for the Appellant

The First Respondent present in person

No appearance for the Second Respondent

Court Assistant: M Nguyayi

