



REPUBLIC OF KENYA



KENYA LAW
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**Gitari & another v Swaleh & another (Environment & Land Case
E004 of 2023) [2024] KEELC 7537 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E004 OF 2023**

A KANIARU, J

OCTOBER 23, 2024

BETWEEN

PETER MUCHANGI GITARI 1ST PLAINTIFF

ESTHER MUTHONI NJIRU 2ND PLAINTIFF

AND

IBRAHIM SWALEH 1ST DEFENDANT

EMBU COUNTY GOVERNEMENT 2ND DEFENDANT

RULING

1. Before me for determination is a preliminary objection dated 29.01.2024 raised by the 1st defendant on the following grounds;
 - a. That there is no competent suit before the honorable court as the purported suit offends the mandatory provisions of Order 4 Rule 1(2) and or (3); Order 3 Rule 1 (a) of the Civil Procedure Rules 2010 as read with section 19(2) of the *Environment and Land Court Act*, 2011 hence incurable, fatally defective, null and void ab initio.
 - b. That there is no competent suit before the honorable court as the purported suit offends the basic but mandatory provisions of Order 3 Rule 1(c) of the civil procedure rules 2010 as read with section 19(2) of the *Environment and Land Court Act*, 2011 hence incurable and fatally defective, null and void ab initio.
 - c. That the applications dated 7th and 14th February 2023 are misconceived, bad in law and together with the entire suit are a non -starter and an abuse of the court process and the same ought to be struck out and or dismissed with costs.



- d. That the honorable court thus lacks jurisdiction to entertain, hear and determine the matter as it cannot breathe life to the fatal defects: thus the court is hereby called upon to vacate any orders, down its tools and dismiss the suit with costs.
2. The preliminary objection was canvassed by way of written submissions. It was submitted by the 1st defendant that the suit as filed concerns two plaintiffs. That it is trite law under Order 4 Rule 1(3) that each of the plaintiffs was required to file a verifying affidavit separately. That the verifying affidavit attached to the plaint herein has been sworn by the 1st plaintiff alone whereas the affidavit indicates that the 2nd plaintiff authorized him to act on her behalf. That no evidence of such authority has been submitted or filed in court as required. It was said that this requirement is reinforced in Order 1 rule 13 (1) and (2) and in the decided case of *Research International East Africa Ltd v Julius Arisi & 213 others* (2007) Eklr. It was submitted that in the absence of the written authority by the 2nd plaintiff, the suit as filed currently is a non-starter.
 3. It was submitted further that Order 3 Rule 1 of the Civil Procedure Rules requires witness statements to be submitted at the time of filing the suit. That the 1st Plaintiff failed to submit witness statements but expressed intent to seek leave to file them within 15 days before the pre-trial conference. However, no such leave has been granted by the court and the 1st plaintiff has also not established why he should be granted leave to file the witness statement fifteen days before the matter is set for pre-trial. The cases of *Alfred Baya Msanzu v Kenya Ports Authority* [2022] Eklr and *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] Eklr among others were proffered in support of the submissions.
 4. The plaintiff's on the other hand in their submissions admitted that the 1st Plaintiff swore a verifying affidavit on behalf of the 2nd Plaintiff but failed to attach a written authority. They pointed out that the suit is at the application stage and the noted that the respondents had not yet filed a defence. They argued that the lack of a written authority does not render the entire suit incompetent and is not fatal. That the court can exercise discretion and direct the plaintiff to fully comply with the rules. They invoked Article 159(2)(d) of *the Constitution*, which calls for the administration of justice without undue regard to procedural technicalities. It was their position that the court has jurisdiction to hear and determine the suit. The cases of *Hezekiah Kipkorir Maritim & 10 others v Phillip Kipkoech Tenai & 2 others* [2016] Eklr, *Chalicha Farmers Co-operative Society Ltd v George Odhiambo & 9 others* (1987) Eklr and *Research International East Africa Ltd v Julius Arisi & 213 Others* [2007] Eklr, among others, were proffered in support of the submissions.
 5. I have taken into consideration the preliminary objection, the party's submissions as well as their arguments. I find that the issue for determination is whether the preliminary objection has merit.
 6. The test for a valid preliminary objection was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. It was observed, that a preliminary objection should raise a pure point of law, should be based on facts that are not in dispute, and should not require any further fact finding. If successful, a preliminary objection should dispose of the entire suit without proceeding to trial. It is notable that the 1st Defendant's objection is based primarily on procedural noncompliance or in other words procedural technicalities. It involves issues such as the lack of written authority from the 2nd Plaintiff and the failure to submit witness statements at the time of filing suit which issues the court must consider whether they render the entire suit fatally defective. In my view, these are matters which do not raise purely legal questions but rather procedural lapses that may be cured through judicial discretion. In light of Article 159(2)(d) of *the Constitution*, which discourages undue reliance on procedural technicalities, this court is inclined to view the absence of a written authority as a procedural irregularity rather than a fatal flaw. The purpose of a verifying affidavit is to



confirm the veracity of the suit, and the omission can be cured by granting leave to file the requisite written authority.

7. This court also observes that the objection has been raised on non-existent provisions of law which includes Order 3 Rule 1(a) and Order 3 Rule 1(c) of Civil Procedure Rules. It is also notable that the applications referred to in ground (c) of the objection have been withdrawn by the plaintiffs and therefore that ground is already overtaken by events. Overall while the 1st Defendant has highlighted procedural lapses in the plaintiffs case, these are not fatal to the suit as they can be rectified by taking the appropriate action. I therefore find that the objections raised do not meet the threshold of a valid preliminary objection. Consequently, the preliminary objection dated 29.01.2024 is dismissed. The 1st plaintiff is granted 14 days to file a written authority from the 2nd Plaintiff and any other necessary documents. Costs are awarded to the plaintiffs.

RULING DATED, SIGNED AND DELIVERED IN THE OPEN COURT AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

In the presence of Githinji Ithiga for Gitonga for Plaintiff and Gitahi for Njoroge for 1st defendant.

Court Assistant – Leadys

A. KANIARU

JUDGE – ELC, EMBU

23.10.2024

