



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)

Neutral citation: [2023] KECA 445 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 52 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
APRIL 14, 2023**

BETWEEN

JOHN KIVURE & 8 OTHERS (SUING ON THEIR BEHALF AND ON BEHALF OF 4201 MEMBERS OF KISHAMBA B GROUP RANCH) APPELLANT

AND

BENSON MULAMBO MWAKINA & 28 OTHERS RESPONDENT

(An appeal arising from the ruling and order of the Environment and Land Court at Mombasa delivered by C.K Yano, J. on 26th February, 2020 in ELC Case No. 74 of 2019)

JUDGMENT

1. This is an appeal from the ruling of the Environment and Land Court, (Yano, J) delivered on February 26, 2020. The appellants, John Kivure & 7 Others (suing on behalf of 4201 members of Kishamba B Group Ranch) were the applicants in the Notice of Motion application dated April 16, 2019. The application was brought against the respondents Benson Mulambo Mwakina and 28 Others, and sought a temporary order of injunction to restrain the respondents from interfering with all that land known as Sagalla/Kishamba B/ 1, hereinafter the suit property.
2. The application was premised on the grounds on the face of the Motion. It was stated that the appellants are part of 4209 persons who are members of a registered Community known as Kishamba B Group Ranch and owners under Customary Law of the suit property situate in Voi, Taita Taveta County, measuring 10684 hectares. That the respondents have failed to register, gazette, survey, demarcate, sub-divide and allocate the suit land since the commencement of the *Community Land Act* No 12 of 2016. That instead the respondents were fraudulently, illegally, unlawfully, unprocedurally and discriminately dealing with the suit property against the interests of the community and without their consent and were alienating the land and giving it out to others.



3. The application was opposed by the 1st respondent who filed a Notice of Preliminary Objection and Grounds of Opposition dated July 24, 2019. Three grounds were raised:
 - i. That the entire suit is bad in law ab initio, fatally and incurably defective for want of leave to file suit in representative capacity contrary to Order 1 Rule 1, 8 12, the [Civil Procedure Rules](#) (hereinafter CPR):
 - ii. That the entire suit is bad in law for want of written authority by four thousand one hundred and ninety three [4193] members to file a representative suit contrary to the provisions of 13(2) (b), (c) and (d) of CPR; and,
 - iii. That the entire suit was bad in law for want of compliance with the provisions of Order 3 Rule (b) (c) and (d) of the [Civil Procedure Act](#).
4. The learned ELC Judge found that appellants failed to comply with the mandatory provision of Order 1 Rule 8 which required them to effect notice to all those affected, and Order 1 Rule 13 which required them to have written authority before bringing the representative suit. The Judge upheld the Preliminary Objection and proceeded to strike out the application and the entire suit with costs to the 1st respondent.
5. The appellants were aggrieved by the findings of the ELC and preferred this appeal. They have 16 grounds of appeal on the Memorandum of Appeal dated July 26, 2020 and summarised as follow;
 - a. That the learned judge exercised judicial discretion wrongly and misdirected himself on the law in finding that the suit in the trial court that was at its infancy stage had not complied with Order 1 Rule 8 of the Civil Procedure Rules.
 - b. Failure to give due regard to Article 159(2)(e) of the [Constitution](#);
 - c. Wrongful exercise of discretion at interlocutory stage;
 - d. Erred by making final and definitive determination on disputed facts at an interlocutory stage;
 - d. Failure to make a pronouncement in the interim injunction sought;
 - e. Failure to believe the letter of authority to sue presented by the appellants;
 - f. Premature striking out of the suit at interlocutory stage;
 - g. Failure to give directions on the appellants' suit before closure of pleadings; and,
 - h. Wrongful award of costs in a public interest matter.
6. It was sought that the impugned ruling be set aside and substituted with an order allowing the injunction sought by the appellants and a dismissal of the 1st to 3rd respondents' preliminary objection dated July 24, 2019.
7. The appeal was heard through the virtual platform on October 5, 2022. Learned counsels Mr Litoro appeared for the appellants, Ms Shariff appeared for the 1st respondent, Ms Langat for the 4th to 7th respondents, Mr Nzaro held brief for Mr Mbago for the 8th respondent and the 1st interested party. There was no appearance for the 9th to 29th respondents despite service of the hearing notice through the email of their advocate on record. Ms Langat stated that the 4th to 8th respondents had not filed any submissions. Mr Nzaro stated that they had filed their submissions that are dated September 21, 2022, and was relying on them entirely and did not wish to highlight.



8. Mr Litoro for the appellants relied on his written submissions and highlighted them before us. He urged that the ELC amended the Preliminary Objection raised by the 1st respondent, which was that the suit was bad for want of leave and for want of written authority from the interested parties on whose behalf the suit was instituted. That the ELC framed a new point of law, being that the appellants did not serve notice of the intention to file a representative suit to all the affected members.
9. Ms Shariff for the 1st respondent relied on the written submissions and urged that the PO raised two issues; non-compliance with Order 1 Rule 8 & 12; and, non-compliance with Order 1 Rule 13. Counsel urged that the appellants represented 4201 members without their consent.
10. This is a first appeal, which arises from a ruling of the ELC in an interlocutory application. As a first appellate, Court our duty is to analyze and re-assess the arguments of counsel and reach our own conclusions. In *Selle and another vs Associated Motors Boat Co Ltd [1968] EA123* the Court of Appeal held:

' The court of appeal is only entitled to interfere with one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of consideration of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account; or fifthly, but his decision, albeit discretionary one, is plainly wrong.' *United India Insurance Core Ltd, Kenindia Insurance Core Ltd and Oriental Fire and General Insurance Core Ltd vs East African Underwriters (Kenya) Ltd [1985] eKLR.*
11. The issue that falls for our determination is whether the ELC Judge misdirected himself as to the Preliminary Objection taken by the 1st respondent, framed a new point of law with which he determined the PO.
12. Mr. Litoro submitted that the ELC misdirected itself on the law, the matter before it, failed to take account relevant matters and acted on wrong principles and made wrong decisions and that for that reason the court should interfere with the said findings. For that proposition he relied on [*Said Ahmed vs Manasseh Denge & Another \[2019\] eKLR.*](#)
13. Mr. Litoro urged that the 1st respondent preliminary objection and submissions were that the suit is defective for want of leave to commence it. He cited the case of [*Rose Wambui Kiarie vs Jane Njeri Ngaruya \[2019\] eKLR*](#) for the proposition that parties are bound by their own pleadings and a court has no jurisdiction to make a determination on unpleaded issues. He urged that even though the ELC found that leave of Court to commence suit was not required, the Court proceeded to deal with a new and unpleaded issue.
14. Ms Shariff relied on their written submissions. In their submissions, they urge that they were pleased with the learned trial Judge to uphold that decision. Ms Shariff submitted that the appellant did not have the written authority of the entire membership of Kishamba B Group to institute the suit. Further the appellants after instituting the representative suit has taken no steps to put the entire membership on notice of the existence of the case before the trial court. They urged that the suit is incurably and fatally defective and ought to be dismissed with costs.
15. Mr Mbago for the 1st interested party in their written submissions opposed the appeal and urged that the learned trial judge was alive to the law and the principles pertaining to representative suits, in upholding the preliminary objection and in striking out the primary suit. Counsel urged that the Court's decision was informed by Order 1 Rule 8 of the Civil Procedure Rules, which provides, inter alia that any party seeking to institute a suit on behalf of members of a group has to first be authorized



by those members in writing. The case of *Ruth Wambui Muturi vs Joseph Karisa Katsoma and 4 Others (2007) eKLR*, was cited where the Court stated that Order 1 Rule 8 laid down the practice to be followed where there are numerous parties having interest in one suit and, gave direction as to the manner in which the rights of all such parties must be safe guarded. That among the principles applicable requires that notice of institution of the suit be given to all the parties interested in the subject matter in the suit.

16. Counsel urged that the requisite notice was not issued by the appellants and that since compliance with Order 1 Rule 8(2) of the CPR goes to the substance of any representative suit and so failure to comply renders the suit fatally defective. He cited in support of that proposition the case of *Partick Kaiseki Mutisya (suing as the personal representative of the estate of Nzomo Mutisya (deceased) vs KB Shangani & Sons Limited & Others (2012) eKLR*.
17. At the beginning of this judgment, we have set out the Preliminary Objection filed by the 1st respondent. However, for ease of reference, the first ground contended that the suit was fatally defective for want of leave from members to file representative suit under Order 1 Rule 1, 8 and 12; and further that it was defective for want of written authority by members.
18. Order 1 Rule 1 and Order 1 Rule 8

' 1. [Order 1, rule 1] 1. 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.

8. [Order 1, rule 8.] 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 of all in same representing all or as representing all except one or more of them.

12. The court may give the conduct of the suit to such person as it deems proper.'

19. The ELC Judge after considering the submissions that were rendered by the parties stated:

' The first issue to determine is whether the plaintiffs had proper locus to institute the instant suit as a representative suit. It is clear and apparent from the plaint that the plaintiffs instituted the present suit on their own behalf and on behalf of 4201 members of Kishamba B Group Ranch. In the plaint, the plaintiffs have annexed a letter of authority signed only by the 8 named plaintiffs. They have also annexed a schedule of a list of names some titled 'members petition list' who purportedly authorized the plaintiffs to file the representative suit on their behalf. In the said list, there are signatures appended against some names but no signatures are appended on others.

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. No order as required in Order 1 rule 1 was obtained and no such notice was issued. The pleadings indicate that the affected members are 4200 meaning that the plaintiffs ought to have moved the court for an order to advertise the notice which has not been done. From the material on record, it is clear that the list of persons that



the plaintiffs presented as having authorized the bringing of the suit on their behalf is not authentic.'

20. The ELC after identifying the issue raised by the 1st respondent was want of leave to file suit and want of authority from members represented in the suit, went ahead to consider other issues. The trial court reasoned that even though the appellants did not need to have obtained leave of court in order to bring the suit, what they were required to do was 'issue notice to all interested parties, of their intention to sue on their behalf'. Hence in the trial court's view, the appellants failed to comply with the provisions of Order 1 Rule 8 since there was no sufficient evidence of authority to represent the members of Kishamba B Group Ranch. The result was the impugned ruling dated February 26, 2020, wherein the appellant's motion for temporary injunction was struck out with costs to the 1st respondent, together with the entire suit.

21. The ELC did not determine the Preliminary Objection presented before it. We have said time and again that it is an established legal principle that parties are bound by their pleadings, that in turn limits the issues upon which a trial court may pronounce itself and no matter how well intentioned the court, it should not go beyond the matters raised by the parties. See *Independent Electoral and Boundaries Commission and another vs Stephen Mutinda Mule 7 3 others [2014] eKLR*. In *Anthony Francis Wareham t/a AF Wareham & 2 others vs Kenya Post Office Savings Bank [2004] eKLR* this Court held:

' Cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings.'

22. The learned ELC Judge went outside the objection raised by the 1st respondent, ventured into areas which were not raised or canvassed, and thus fell into error. The issue is what then can we do in this appeal. The answer is under Rule 33 of this Courts Rules which gives the general powers of this Court and provides as follows:

- ' 33. On any appeal from a decision of a superior court, the Court shall have power, so far as its jurisdiction permits— General powers of the Court.
- a. To confirm, reverse or vary the decision of the superior court;
 - b. To remit the proceedings to the superior court with such directions as may be appropriate; or
 - c. To order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.'

23. Being guided by the above rule, we find that the orders that commend themselves to us are as follows:

1. The appellants appeal is allowed, the ruling of the ELC [Yano, J] dated February 26, 2020 is set aside;
2. This case, ELC No 74 of 2019 be returned to the Environmental and Land Court, Mombasa for hearing and determination by any other Judge other than Yano J.
3. This file be placed before the Deputy Registrar, ELC Mombasa within 7 days of today's date, with instructions to fix the suit for Case Management for purposes of giving directions as to the hearing afresh of the Preliminary Objection by the 1st respondent dated July 24, 2019.
4. The appellant will have the costs for the appeal.



DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

