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Court:	High Court at Nakuru
Case Action:	Ruling
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	MICHAEL KISHON OLE RISA & 8 others v GIDEON S. KONCHELLAH & 15 others [2010] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 129 OF 2004**

**MICHAEL KISHON OLE**  
RISA.....1<sup>ST</sup>  
**PLAINTIFF**

**PAUL OLE KOINI**.....  
.....2<sup>ND</sup> PLAINTIFF

**MWANIKI OLE RONGO**.....  
.....3<sup>RD</sup> PLAINTIFF

**FRANCIS LEDAMA**  
MUSERE.....4<sup>TH</sup>  
**PLAINTIFF**

**DANIEL NDUDULA**  
MAGUIAN.....5<sup>TH</sup>  
**PLAINTIFF**

**SANTI OLE KIMONE**.....  
.....6<sup>TH</sup> PLAINTIFF

**JOHN KIINE MUSHARU**.....  
.....7<sup>TH</sup> PLAINTIFF

**KOTIKASHI OLE**  
**T**  
ALAM.....8<sup>TH</sup>  
**PLAINTIFF**

**JOSEPH LEMAIYIAN OLE**  
NYOIKE.....9<sup>TH</sup> PLAINTIFF

**VERSUS**

**HON. GIDEON S.**  
KONCHELLAH.....1<sup>ST</sup>

	<b>DEFENDANT</b>	
TINA.....	<b>BENJAMIN OLE</b>	<b>2<sup>ND</sup></b>
	<b>DEFENDANT</b>	
KANCHUEL.....	<b>JOHN ORETY OLE</b>	<b>3<sup>RD</sup></b>
	<b>DEFENDANT</b>	
KIPKURO.....	<b>LEPERES OLE</b>	<b>4<sup>TH</sup></b>
	<b>DEFENDANT</b>	
JOHN K. OLESOSIO.....	<b>5<sup>TH</sup> DEFENDANT</b>	
	<b>MATHEW OLE</b>	<b>6<sup>TH</sup></b>
TWALA.....	<b>DEFENDANT</b>	
	<b>CHRISTOPHER OLE</b>	<b>7<sup>TH</sup></b>
KIRUI.....	<b>DEFENDANT</b>	
LETUI OLE KANCHUEL.....	<b>8<sup>TH</sup> DEFENDANT</b>	
	<b>SARANKEL OLE</b>	<b>9<sup>TH</sup></b>
MUNTET.....	<b>DEFENDANT</b>	
JOHN OLE MONTET.....	<b>10<sup>TH</sup> DEFENDANT</b>	
	<b>MATHEW B.</b>	<b>11<sup>TH</sup></b>
KONGONYE.....	<b>DEFENDANT</b>	
	<b>COUNTY COUNCIL OF</b>	<b>12<sup>TH</sup> DEFENDANT</b>
NAROK.....		
	<b>THE DIRECTOR OF LAND ADJUDICATION &amp; SETTLEMENT</b>	<b>13<sup>TH</sup></b>
	<b>DEFENDANT</b>	
	<b>THE CHIEF LAND</b>	<b>14<sup>TH</sup></b>
REGISTRAR.....	<b>DEFENDANT</b>	
	<b>THE DISTRICT LAND</b>	

REGISTRAR.....15<sup>TH</sup> DEFENDANT

THE HON. ATTORNEY

GENERAL.....16<sup>TH</sup> DEFENDANT

**RULING**

This suit was commenced by way of plaint filed on 7/5/2004 by Kiplenge/Ogola Advocates on behalf of 9 individuals who were suing as representatives of Olalui Group Ranch, against the 12 defendants, namely Hon. Gideon S. Konchellah, Benjamin Ole Tina, John Oreyo Ole Kanchuel, Leperes Ole Kipkuro, John K. Olesosio, Mathew Ole Twala, Christopher Ole Kirui, Letui Ole Kanchuel, Sarankel Ole Muntet, John Ole Montet, Mathew B. Kongonye, County Council Of Narok, The Director Of Land Adjudication & Settlement, The Chief Land Registrar, The district land registrar, The hon. Attorney general. The plaintiffs claim to be the registered owners of Narok/Transmara/Olalui measuring 7241.0 Ha which was fraudulently registered in the name of the Narok County Council, the 12<sup>th</sup> defendant, fraudulently with collusion of former group representatives 4<sup>th</sup> to 11<sup>th</sup> defendants. They seek an order that the transfer and subdivision of the said parcel of land to be declared null and void.

On 25/4/09, the plaintiffs were granted leave to amend the plaint to join the 13<sup>th</sup> to 16<sup>th</sup> defendants. By an order of this court, the amended plaint was filed on 14/5/09. 1<sup>st</sup> to 12<sup>th</sup> defendants who are represented by Ongegu Advocates filed a notice of preliminary objection dated 20/2/07. The 13<sup>th</sup> to 16<sup>th</sup> defendants were represented by Nguyo Wachira Advocate of the State Law Office who also filed a notice of preliminary objection dated 25/8/09. It is the two preliminary objections that were urged before me and are for consideration in this ruling. Mr. Ogutu who represents the plaintiffs opposed the objections.

The court in **MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD 1968 EA 696-701** said that:-

**“.... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion .....**”

This court has to consider the preliminary objections raised in the context of the above decision and determine whether indeed what was raised are pure points of law that can determine the present suit without having to hear it on merit.

I will not consider the objections in the sequence in which they were urged. One of the defendants' objection is to the filing of this suit at this High Court whereas it should have been filed in Kisii High Court. This is because the suit land is situate in Transmara, and the defendants reside there. I do agree with the plaintiff's counsel that there is only one High Court in Kenya and that this court has original jurisdiction in all cases but the High Court has territorial jurisdiction in Kenya which have been gazetted for administrative purposes, distribution of work amongst the judges and for convenience of the parties too. It would be chaotic if parties were to file cases wherever they thought it convenient to them ignoring the others involved in the suit and that might lead to abuse of court process and inconvenience to the other parties. That is why we have territorial jurisdiction which the plaintiff should have complied with. In my view however, I do not think that failure to file this suit in Kisii High Court would be good reason to have it struck out. Courts are now enjoined under **Section 1A, B** of the **Civil Procedure Act** to ensure, just and speedy expeditious disposal of cases on merit. Striking out this suit would mean the filing of a fresh suit at the Kisii High Court which entails delay and extra costs. The best that this court can do is to have this suit transferred to Kisii High Court, if the court does not uphold the objections raised.

Mr. Wachira appearing for the 13<sup>th</sup> to 15<sup>th</sup> defendants objected to these proceedings on the ground that **Section 13A** of the **Government Proceedings Act** was not complied with and the proceedings cannot be maintained against the Attorney General. Counsel urged that the court granted the order to amend the plaint on 28/4/09 and the amended plaint was filed on 14/5/09 and that no notice of intention to sue had been served on the Attorney General. It is the amended plaint that brought the Attorney General into these proceedings. **Section 13A** of the **Government Proceedings Act** requires that a thirty day notice be served on the Government before any proceedings can be commenced against it. Under **Section 12**, the Attorney General is the person to be served on behalf of Government. The contents of the notice are supposed to conform with **Section 13A(2)** i.e. name and description of the plaintiff, the date when the alleged cause of action occurred, name of Government Department concerned and full names of any servant or agent that is intended to be joined as a defendant, a concise statement of the facts and the relief sought. All these particulars are required to enable the state know how to respond to the allegation. The persons or department concerned would have to be consulted to enable the Attorney General concede to the claim or file defence. Mr. Ogutu counsel for the plaintiffs took the view that the issue of service of notice on the AG cannot be raised as a preliminary objection but should be canvassed at the hearing and the preliminary objection is premature. In **SAMSON LEREYA & OTHERS V THE HON. THE AG & OTHRS NRB HCC NO. 115/06** a three judge bench held that non compliance with **Section 13A** was fatal to a plaint. I hold the same view that the 30 day statutory notice to the AG is a precondition to filing a suit against the Government (AG). Failure to comply renders the whole process incompetent and the defendants' objection on that point is sustained.

The other ground of objection is that the suit is statute barred. Mr. Wachira urged that fraud is alleged in the amended plaint, that the registration of the land was in February 1985. That the amended plaint was filed in 2009 and negligence is alleged against public officers and the suit should therefore have been filed within 12 months in compliance with **Section 13A (2)(b)** of the **Government Proceedings Act**. Mr. Bosire also submitted that the amendment was sought in order to circumvent this preliminary objection. Now that it has been pleaded fraud was discovered in 2004. In reply Mr. Ogutu submitted that the issue of limitation is not a part of law and it depends on facts and evidence that will be adduced at the substantive hearing. In **SAMWEL OYWA WAYUGA V TRUSTEES OF THE CHURCH OF PROVINCE OF KENYA SOUTH NYANZA DIOCESE HCC NO. 464 (KISII)** J. Musinga held that the issue of limitation can only be determined by adducing evidence AT A HEARING. He relied on the case

of **GEORGE WANYOIKE V AG HCC NO. 574/04** where the court held that whenever an issue of limitation was raised, it should be reserved for determination at the trial on the basis of oral evidence, similarly J. Ringera in **GARDEN SQUARE LTD V SAMMY BOIT KOGO & ANOTHER HCC NO. 266/02** was of the same view. In this case, the defendants allege that the cause of action arose 22 years ago and the amendment to the plaint was meant to circumvent this objection. It was also urged that the **Public Authorities Limitations Act, Section 3** provides that proceedings on tort shall be brought against the Government or Local Authority within twelve months and even though the amended plaint indicates that the cause of action arose in 2004, the suit was amended in 2009, well after 4 years. It is in contest when the cause of action arose and whether the cause of action is statute barred. I would agree with the case law that was relied upon that, that is an issue to be determined at the hearing of the main suit. For a point of law to be raised, the facts should not be in dispute.

An Objection was also raised to the effect that the plaintiff did not file a verifying affidavit with the amended plaint. It is the plaintiffs' contention that it was not necessary to file the amended plaint with another verifying affidavit. In the past courts have taken different views as to whether or not a plaint should be struck out for want of a verifying affidavit or a defective affidavit. In **GAWO V NAIROBI CITY COUNCIL (2001) EA 69** where the Court of Appeal held:-

**“In this dispute the issue of verifying affidavit as per Order VII Rule 1(2) of the Civil Procedure Rules is very important. The rule clearly states that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”**

In the above case the court was of the view that without a verifying affidavit, the suit could not be maintained. However, recent decisions both in Court of Appeal and High Court seem to have departed from the above trend and the emphasis is now on substantive justice being done as opposed to laying emphasis on form. In **RESEARCH INTERNATIONAL EAST AFRICA LTD V JULIUS ARISI & 213 OTHERS**, the Court of Appeal found that the verifying affidavit was filed without authority of the 213 plaintiffs and held that it did not have to strike the plaint out. Again, in **JOSEPH KIPCHIR SIGILAI V GOTAB SAMIK ENTERPRISE LTD & 4 OTHERS CA 98 of 2003**, the Court of Appeal when dealing with the issue of lack of or defect in a verifying affidavit said:-

**“There are conflicting decisions of the superior court on this issue. We do not consider it necessary to go into them because of the view we have taken that the intention of the Rules Committee appears to us to have been to prevent plaintiffs from evasive and obscure pleadings, to prevent parties filing frivolous suits and also to obviate a multiplicity of suits. We think an omission to fully comply with the provisions is mere irregularity which, except in very clear cases, may be cured.**

.....  
..... **The power of the court to strike out a plaint for non-compliance with O.VII rule 1(3), is discretionary considering the language of the sub-rule.”**

The Court of Appeal allowed the appellant to comply with **Order VII Rule 1(2)** of the **Civil Procedure Rules** by swearing a verifying affidavit.

In the amended plaint, new parties were brought into the suit i.e. 13<sup>th</sup> to 16<sup>th</sup> defendants. New issues have been introduced at paragraphs 11A and 11B and fresh particulars of fraud pleaded at paragraph 7(e) and 9. Ideally the plaintiffs should have filed a fresh verifying affidavit to verify the correctness of the facts pleaded in the amended plaint. However, it is my view that failure to file a verifying affidavit to accompany the amended plaint has not prejudiced the defendants in any way. No prejudice has been alluded to. The plaintiff can still regularize this anomaly without the court necessarily striking out the amended plaint which would cause delay, increase the costs and prejudice to the plaintiffs due to a mere slip by the plaintiffs' counsel. Besides, this being a Preliminary Objection and on the authority of **MUKISA BISCUITS** case, only a pure point of law which does not seek the exercise of judicial discretion may be raised.

The other ground of objection to this suit is that the plaintiffs are an amorphous group and it is not clear who gave instructions for the filing of the suit against the 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> defendants. The defendants describe themselves as a duly registered Group Ranch, under the **Land (Group Reprehensive) Act Cap 287 Laws of Kenya**. However, it is not disclosed who the people named in the plaint are. Are they officers of the Group and do they have the authority of the Group to bring this suit on behalf of the Group under **Section 7(3)** of the **Land Act**. Upon the issuance of a certificate to a Group, the Group becomes a body corporate with perpetual succession. It means that it can sue and be sued in its own name and that is what should have happened. All the persons elected become its officers. Since no verifying affidavit has been filed, the persons named as plaintiffs have not disclosed what role they play in the said group. It is true that they have not described themselves anywhere. Even in the verifying affidavit filed with the original plaint they did not disclose who they are in the Group ranch and whether they had authority to sue. The 1<sup>st</sup> plaintiff described himself as the chairman of the ranch and that he has authority to swear the affidavit but he does not state that he had the authority of the other plaintiffs. This is not a representative suit envisaged under **Order 1 Rule 8**. According to Mr. Ogutu, counsel for the respondents, the issue of the plaintiffs being an amorphous body is not a preliminary objection as it is not a pure point of law. He made reliance on the **MUKISA BISCUITS CASE**. Under **Order 1 Rule 8**, where there are several persons having the same interest in one suit, then one or more can sue and may be authorized by the court to sue or defend on behalf of others. In the instant case, it is pleaded that the Group Ranch is suing through its representative. Though I have noted earlier that only Michael Lakishion describes himself as the chairman of the group, the court has no idea who the persons are in the Group and the verifying affidavit does not indicate how the deponent has made these depositions on behalf of the other persons named as plaintiffs. On the other hand Michael Kishon did not seek this court's authorized to file a representative suit on behalf of the others. As things stand, it is not clear who the plaintiffs in this case are. That cannot invalidate the suit. The plaintiffs can be allowed time to amend the plaint and bring the proper parties.

As regards whether a preliminary objection can be raised at this stage on the original plaint, I do agree with the plaintiffs' counsel that it cannot. The original plaint has been amended. If there was a preliminary

objecting in respect of the original plaint, it has been overtaken by events once the amended plaint was filed.

It is also the defendants' contention that there is misjoinder of parties in that the 13<sup>th</sup> to 15<sup>th</sup> defendants who are Government officials cannot be sued in their official capacities. Section 12 of Government Proceedings Act provides that the Attorney General is the party to be sued on behalf of the Government.

**Under Order 1 Rule 9** non-joinder or misjoinder of parties cannot invalidate a suit. It is true that no orders may be obtained from the 13<sup>th</sup> to 15<sup>th</sup> defendants named in their official capacities, since the Attorney General has been joined to these proceedings. But that can be cured by way of amendment or by the court merely striking off the 13<sup>th</sup> to 15<sup>th</sup> defendants and order for compensation to them by way of costs. I have also noted that the plaintiffs do not attribute any wrong in the 1<sup>st</sup> to 3<sup>rd</sup> defendants. It is not indicated why they are joined to these proceedings as defendants. However, the misjoinder of parties cannot be reason for striking out a suit.

For all the foregoing reasons, I find that the mandatory statutory notice under **Section 13A** of the **Government Proceedings Act** was not issued on the AG and that omission deals a fatal blow to the proceedings against the 13<sup>th</sup> to 16<sup>th</sup> defendants, all being Government officials. I also find that there is no verifying affidavit in support of the amended plaint and the amended plaint does not indicate who the plaintiffs are. The plaintiffs are allowed 30 days within which time they should comply with **Order VII Rule 1(2)** of the **Civil Procedure Rules** and amend their plaint. I will also order that this matter be transferred to Kisii High Court for hearing and determination because that is where the suit property is situate and all the parties hail from that area. The other objections are dismissed. The plaintiffs to bear costs of this preliminary objection.

**DATED and DELIVERED this 17<sup>th</sup> day of December, 2010.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Kisila for the plaintiffs.

N/A for the defendants.

Kennedy – Court Clerk.



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