



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 102 of 2005

PHILIKONA HAMISI NDOLWA 1ST PLAINTIFF
SAMUEL MWALLEMI 2ND PLAINTIFF
NEMMYSIUS M'NJAU KYARIE 3RD PLAINTIFF
KEA OMAR KARISA 4TH PLAINTIFF
JACINTER NJUGUNA 5TH PLAINTIFF

(Suing on their own behalf and on behalf of other 700 tenants of the Old Estate and New Estate of the 2nd defendant's flat in Changamwe Estate)

- Versus -

NATIONAL HOUSING CORPORATION 1ST DEFENDANT
MUNICIPAL COUNCIL OF MOMBASA 2ND DEFENDANT

Coram: Before Hon. Justice L. Njagi

Kariuki for the Plaintiff/Applicant

Mr. K'opere for 1st Defendant/Respondent

Ms. Arunga for Kibara for 2nd Defendant

Court clerk – Kinyua

R U L I N G

This suit was instituted by the five plaintiffs on record, suing on their behalf and on behalf of other 700 tenants of the Old Estate and New Estate of the 2nd defendant's flat in Changamwe Estate.

The suit was filed in court on 3rd June, 2005. Exactly five months later, to wit, on 3rd November, the 1st defendant filed a notice of preliminary objection stating, inter alia –

“No authority to appear, plead or act for the other 700 tenants of old and new Changamwe Estates was obtained and/or filed in court by the 5 plaintiffs as required by Order/rule 12 of the Civil Procedure Rules and accordingly the entire suit is bad in law, a nullity and should be struck out with costs.”

During the hearing of the preliminary objection, Mr. K’opere appeared for the 1st defendant/applicant; Ms. Arunga held brief for Mr. Kibara for the 2nd defendant; and Mr. Kariuki appeared for the plaintiffs/respondents. Mr. K’opere submitted that the plaintiffs had failed to comply with Order 1 rule 12 which requires that written consent be given when some plaintiffs act for others. He referred the court to **BUNSON TRAVEL SERVICE LTD. & ORS. v. KENYA AIRWAYS LTD., Nairobi (Milimani) HCCC No. 34 of 2004; CHALICA FCS LTD. v. ODHIAMBO & 9 ORS.** [1987] KLR 182; and then submitted that the court’s jurisdiction in this matter had not been properly invoked and therefore the pleadings should be struck out as they were a nullity. He also argued that **GOMBATO (1975) LTD. v. NATIONAL BANK OF KENYA**

Mombasa HCCC No. 549 of 2000 was distinguishable.

Ms. Arunga associated herself with Mr. K’opere’s submissions which she supported entirely.

For his part, Mr. Kariuki for the plaintiffs submitted that the suit did not offend the provisions of Order 1 rule 12. He referred to the supporting affidavit dated 31st May, 2005 which he argued contains a list of 235 people who have given authority to the five applicants to commence this suit on their behalf. He thereupon submitted that the requirements of Order 1 rules 8 and 12 had been satisfied. He further submitted that the position here is distinguishable from that obtaining in the authorities relied on by the applicant. He urged the court to exercise its unfettered discretion, hold that the suit filed herein is properly before the court, and dismiss the preliminary objection.

After considering the pleadings and arguments of counsel, I find that the only issue to be determined is whether this suit is compliant with Order 1 rule 12 of the Civil Procedure Rules. In so far as is relevant to this matter, that rule is in the following terms –

“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings ...”

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

Paragraph 1 of the plaint filed herein states –

“The plaintiffs are adults of sound mind and tenants of the Old Estate and the New Estate collectively known as Changamwe Estate, Mombasa ... The plaintiffs are suing on their behalf and on behalf of all the other plaintiffs who claim to be tenants of the said estate ...”

On this admission, the five plaintiffs are alive to the fact that there are more plaintiffs than one, and that they themselves are suing on behalf of all the others. Where such a state of affairs obtains, then Order 1 rule 12 comes into play, and those that are conducting the matter on behalf of the others require the authority of those others. Such authority should be in writing and signed by each party giving it. On the face of the record, there is nothing to show that the other 700 tenants, on whose behalf the action is brought, have given the requisite authority in writing and signed it as required by rule 12(2).

Counsel for the plaintiffs referred to an affidavit in support of an application dated 31st May, 2005, to which is annexed a list of 235 names of people who have given authority to the applicants in satisfaction of the requirements of rule 12. Indeed, by an application by chamber summons dated 31st May, 2005, the plaintiffs applied for leave to bring this suit in a representative capacity on their own behalf and on behalf of all the other 700 tenants. If I understood him correctly, Mr. Kariuki for the plaintiffs submitted that the court allowed the plaintiffs to bring a representative suit and to advertise. They accordingly advertised in

the Daily Nation of 6th March, 2005, and that compliance with rule 12 was not envisaged. He went on to submit that some 235 persons had authorized the applicants to file the suit on their behalf, and that this was adequate authority for a clear cut representative action.

A few points arise from this submission. In the application by chamber summons dated 31st May, 2005 as well as in the supporting affidavit, it is clearly indicated immediately after the names of the plaintiffs that they are suing on their own behalf and on behalf of other 700 tenants. To the supporting affidavit is annexed a list of 235 tenants who attended a special general meeting on 2nd December, 2004. It was at this meeting that the issue of commencing legal proceedings against the defendants was mooted, and undertaking given for the payment of costs, charges, and fees in respect of the court action. Assuming that this was meant to comply with Order 1 rule 12, then this document would cater for only 235 tenants, and not 700. What then happens to the other 365? Secondly, even though the list comprises 235 names, 70 of those named have not signed the list. This would mean that only about 165 tenants would have signed the list, and conversely, that more 500 tenants have not signed and therefore have not given any authority. Who then, are these 700 other tenants on whose behalf the five plaintiffs have commenced action?

If I understood counsel for the plaintiffs to contend that the applicants were allowed to bring a representative action and that compliance with Order 1 rule 12 was not envisaged, then the very application under which the court allowed the action betrays that position. The application was expressed to be made under Order 1 rules 8, 12 and 22 ... of the Civil Procedure Rules. This means that the applicants were alive to the requirements of rule 12, with which they have not complied. Failure to do so renders the suit incompetent.

In the circumstances, the preliminary objection is upheld and the suit struck out with costs to the defendants. It is so ordered.

Dated and delivered at Mombasa this 23rd day of February, 2007.

L. NJAGI

JUDGE