



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT**  
**MALINDI**  
**CIVIL CASE 85 OF 2007**

**MORRIS L. NYIRO AND 3 OTHERS.....PLAINTIFF**

**VERSUS**

**KALUME MOLLE AND 16 OTHERS.....DEFENDANT**

**R U L I N G**

By an application by way of chamber summons dated 15<sup>th</sup> October 2007, pursuant to the provisions of Order 1 Rules 8(1), (2) and 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant seeks orders:

***(1) That this application be certified urgent.***

***(2) That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs be granted leave to institute this case on behalf of members of the 4<sup>th</sup> plaintiff.***

***(3) That upon grant of this leave this suit be deemed to have been instituted with leave of this court at the time of its filing in court.***

***(4) That directions be given for the manner in which notice of the institution of the suit to the members of the 4<sup>th</sup> plaintiff shall be effected.***

***(5) That costs of this application be costs in the cause.***

The application is based on the grounds:

***(1) That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are members of the managing committee of the 4<sup>th</sup> plaintiff.***

***(2) That the 4<sup>th</sup> plaintiff is a Co-operative Society with 50 members.***

***(3) That the plaintiffs are claiming against the defendants an Environmental Restoration Order compelling the defendants by themselves, their agents and/or servants to restore the environment***

***within the 4<sup>th</sup> plaintiffs designated quarry sites or Magarini division to the state it was before the defendants quarrying activity and preventing the defendants from carrying on sand harvesting within Magarini Division without adhering to the 4<sup>th</sup> plaintiff's sand harvesting guidelines and/or condition OR ALTERNATIVELY pay to the 4<sup>th</sup> plaintiff a levy per tonne of sand harvested to meet the 4<sup>th</sup> plaintiffs costs of restoring the environment.***

***(4) That the members of the 4<sup>th</sup> plaintiff have the same and/or common interest in the suit.***

***(5) That for expediency purposes and in order to prevent a multiplicity of suits, the plaintiffs need leave to file the suit on behalf of the 4<sup>th</sup> plaintiff's members.***

The application is predicated upon the annexed affidavit of Morris L. Nyiro sworn on the 15<sup>th</sup> day of October 2007.

For the applicant it was argued that the 4<sup>th</sup> plaintiff is a co-operative Society with 50 members. That it is duly registered under the Co-Operative Act (Cap 490) Laws of Kenya. A copy of the Registration Certificate is annexed as "MN I". The second and third plaintiffs are members of the managing committee of the plaintiff. The first plaintiff is chairman, the second plaintiff treasurer and the third plaintiff secretary.

That the 50 members of the 4<sup>th</sup> plaintiff own quarries within Magarini Division of Malindi district. The 4<sup>th</sup> plaintiff has been granted on Environmental Impact Assessment licence or permit by the National Environmental Management Authority to carry out sand harvesting within Magarini Division. A copy of the permit is exhibited as "MN 2".

That the 4<sup>th</sup> plaintiff is charged with the responsibility of marketing, selling, grading and transportation of sand harvested within Magarini Division apart from other responsibilities.

That the 4<sup>th</sup> plaintiff is solely supported by the licensing authority to undertake sand harvesting activity in Magarini Division. A copy of the sand harvesting guidelines is exhibited as "MN 3".

That the licence issued to the 4<sup>th</sup> plaintiff was conditioned upon the 4<sup>th</sup> plaintiff adhering with the sand harvesting guidelines and environmental management plan issued by the National Environmental Management Authority. In default of compliance the licence would be revoked.

That the defendants own sand quarries within the 4<sup>th</sup> plaintiff's designated sand quarry sites and/or Magarini division.

That the defendants are not individually licenced to harvest sand within Magarini division which is the 4<sup>th</sup> plaintiff's designated said quarry sites but they do harvest sand purportedly under the umbrella of the 4<sup>th</sup> plaintiff's licence or permit.

That the said sand harvesting activities have resulted in extensive environmental degradation within the 4<sup>th</sup> plaintiff's designated sand harvesting sites as per exhibit "MN 5". The result is that the National environmental Management Authority has threatened to revoke the 4<sup>th</sup> plaintiff's licence with attendant loss and consequences. The defendants have refused to restore the environment or pay to the 4<sup>th</sup> plaintiff the requisite levy to meet the costs of the environmental restoration by the 4<sup>th</sup> plaintiff and is denying the plaintiffs their rightful settlements to a clean and healthy environment.

By reason of the foregoing members of the 4<sup>th</sup> plaintiff intend to sue the defendants jointly and severally for Environmental Restoration order compelling the defendants to restore the environment as near as it may be to the state it was previously. Alternatively, for payment of the prescribed levy to the 4<sup>th</sup> plaintiff

to meet the 4<sup>th</sup> plaintiff's costs for restoring the environment under Section 3, Section III and Section 108 of the Environmental Co-ordination Act No. 8 of 1999.

That the 50 members of the 4<sup>th</sup> plaintiff has a common interest in the claim. A copy of the resolution of the said members is exhibited as "MN 7".

Order 1 Rule 8(1) Order (2) of the Civil Procedure Rules provides:

***"Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.***

***The court shall in such case direct the plaintiff to give notice of the institution 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".***

In my humble view Order 1 Rule 8 presupposes that a suit has not yet been instituted. Upon obtaining the order the suit is to be instituted by the applicant. However, in this case the suit was instituted on 16<sup>th</sup> October 2007. I take the position that it would be superfluous to grant leave to institute a suit which has already been instituted anyway.

For that reason, the application fails and is struck out with no orders as to costs.

**DATED** and delivered at Malindi this 7<sup>th</sup> day of November 2007

**N. R. O. OMBIJA**

**JUDGE**