



REPUBLIC OF KENYA



KENYA LAW
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**Famau & 2 others v Noorbhair (Environment & Land Case E013 of 2021)
[2022] KEELC 15373 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E013 OF 2021
MAO ODENY, J
DECEMBER 19, 2022**

BETWEEN

MOHAMED ATHMAN FAMAU 1ST APPLICANT

DHADHO ALII JILO 2ND APPLICANT

FATUMA HAILU GULU 3RD APPLICANT

AND

ASGARALI SADAKALI NOORBHAIR RESPONDENT

RULING

1. This ruling is in respect of a notice of motion dated July 29, 2021 by the applicant seeking the following orders:
 - a. Spent.
 - b. This honourable court do grant the applicants leave to commence and continue this suit as representatives of 359 others whose names are contained in a list annexed hereto.
 - c. This honourable court do grant the applicants an injunction restraining the respondent from alienating, selling, disposing plot No Lamu/Island Block IV/26 and plot No Lamu Island/Block IV/29 and from interfering in any way with the quiet possession of the applicants and those they represent in this suit in other words from evicting, ejecting and or removing them from the said properties pending the hearing and determination of this suit.
 - d. Spent.
 - e. Costs of this application.
2. The applicant relied on the grounds on the face of the application and a supporting affidavit sworn on July 29, 2021 by the 1st applicant who deponed that the applicants have occupied the properties



plot No Lamu/Island Block IV/26 and plot No Lamu Island/Block IV/29 for about 20 years. That the respondent has shown his intention to evict the applicants from the suit properties by filing suit against one of the residents thereon, being Lamu Principal Magistrate Court Suit No 14 of 2019 Asgarali Sadakali Noorbhai v Mark Kyule Phidelis alias Marklin. That the applicants' attempts to be joined in the said suit was declined.

3. In response to the application the respondent filed a replying affidavit on September 27, 2021 and deponed that the application was pegged on false facts and that the 1st applicant had no authority to swear the supporting affidavit on behalf of the others. According to the respondent, the applicants started encroaching into his land in the year 2018 which prompted him to file the suit Lamu PMCRC No 85 of 2018 *Republic v Mark Kyule Fidelis alias Marklin*.
4. The respondent confirmed that indeed he also filed Civil Suit No 14 of 2019 where judgment was entered in his favour of August 27, 2021 with an order to evict the defendant therein. The respondent explained that the said Marklin had invited strangers into the suit properties in the name of owning the properties.
5. The respondent further deposed that the applicants herein never sought to be joined in the said civil suit and that the only application for joinder was made by the same defendant but declined by the court for not being proper before the court.
6. The respondent stated that the list of 359 people was falsified and that the people listed thereon were not occupants in the suit properties and urged the court to conduct a site visit to establish the correct position as to the number of alleged squatters.
7. Counsel for the applicants submitted that the applicants having established a *prima facie* case their case the court should order that *status quo* be maintained pending the hearing and determination of the suit. Counsel relied on the case of *Satrose Ayuma & 11 others v The Registered Trustees of the Kenya Railway Staff Retirement Benefit Scheme & another* HCCCP No 65 of 2010.
8. Counsel for the respondent submitted that the application was devoid of merit, scandalous and abuse of the court process for offending the provisions of order 2 rule 15 of the *Civil Procedure Rules*. That no appeal or review was filed against the judgment of the lower court and therefore it was not proper for this court to proceed with this suit.
9. Counsel further submitted that the suit being a representative suit, was not in compliance with the provisions of order 1 rule 8 of the *Civil Procedure Rules* and urged the court to dismiss the application with costs.

Analysis And Determination

10. The issue for determination is whether the applicant has met the threshold for bringing a representative suit on behalf of the 359 applicants. Whether this application is proper before the court as a judgment had been delivered in respect of the suit land and neither a review nor an appeal has been preferred.
11. Counsel for the respondent submitted that the application and entire suit was defective because they offend the mandatory provisions of order 1 rule 8 which provides:
 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 representing all or as representing all except one or more of them.



2. The parties shall in such case give notice 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.
 3. Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.
12. Further, order 1 rule 13 (1) and (2) of the [Civil Procedure Rules](#) provides as follows:
- (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 proceeding, and in like manner, where there are more defendants 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 proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.
13. Order 1 rule 8 is quite clear that in 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 which requirement is mandatory and no such notice was issued.
14. The pleadings show that the affected members are 359 which means that the applicants ought to have moved the court for an order to advertise the notice which has not been done. The list of persons that the applicants presented as having authorized the filing of the suit on their behalf was not authenticated by any official which suggests that applicants may just have listed down random names, inserted identification numbers and telephone numbers.
15. It is also evident that there was no signed letter of authority from any of the applicants except supporting affidavits filed together with the originating summons.
16. The reason for the notice is to give the interested parties a choice whether to be joined in the suit or not as they will be eventually be bound by the outcome of the suit and the decree of the court.
17. Consequently, I find that the applicants have not complied with the provisions of order 1 rule 8, no sufficient evidence of authority to represent the 359 members was tendered, the same is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF DECEMBER, 2022.

M.A. ODENY

JUDGE

