



REPUBLIC OF KENYA



**Savala & another v Ndanyi (Environment and Land Case Civil Suit  
248 of 2021) [2022] KEELC 2536 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2536 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 248 OF 2021**

**LL NAIKUNI, J**

**JULY 5, 2022**

**BETWEEN**

**SONY SAVALA ..... 1<sup>ST</sup> PLAINTIFF**

**EDWIN AMLELE NDANYI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BRAYAN AGUNDA NDANYI ..... DEFENDANT**

**RULING**

**I. Preliminaries**

1. What is before this Honorable Court for its determination is a Notice of Motion application filed by the 1<sup>st</sup> Plaintiff/Applicant dated 7<sup>th</sup> February 2022. It is brought under the provisions of Order 1 Rule 2, Order 50 Rules 1 of the [Civil Procedure Rules](#), 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya.

**II. The 1<sup>st</sup> Plaintiff/Applicant's Case.**

2. The 1<sup>st</sup> Plaintiff/Applicant seeks for the following orders: -
  - a) That the Applicant be removed as a party to this suit.
  - b) That the suit allegedly by the Applicant be withdrawn with costs.
  - c) That Costs of this application be awarded to the Applicant.
3. The Notice of Motion application is founded on grounds, testimony and averments in the 8 Paragraphed Supporting Affidavit of Sony Savala, sworn and dated on 5<sup>th</sup> February 2022. He deponed that he was a Senior citizen aged 70 years and presently residing in the remote village of Matisi in Kitale, the County of Trans Nzoia. He was the Applicant and a total stranger to and knows nothing about



this suit. He never instructed the law firm of the Messrs. Mboku & Company advocates on record or any other individual advocates to institute the suit on his behalf as against the Defendant. He had not been to Mombasa in the recent past or any time last year.

4. He averred that he only became aware of the suit when he received a phone call from the Defendant late evening on Sunday 16<sup>th</sup> January 2022 asking him about the suit. He never authorized the 2<sup>nd</sup> Plaintiff to institute this suit or any other suit on his behalf thus the facts deponed to in the Verifying Affidavit and the Supporting affidavit in the suit sworn by the Edwin Amlele Ndanyi were not true or correct. The Applicant stated that he had no interest in the suit and prayed that it be withdrawn as against him with costs and he removed as a party to the suit.

### **III. The 2<sup>nd</sup> Plaintiff/respondent**

5. The 2<sup>nd</sup> Plaintiff/ Respondent opposing the application, filed a Replying Affidavit sworn by Edwin Amlele Ndanyi and dated 22<sup>nd</sup> March 2022. He deponed that he believed to be true the advice given to him by his advocates. He held that the Honorable Court could “Suo moto” call the Applicant as he was a crucial witness in the subject matter and the issues at hand. He opined that the presence of the 1<sup>st</sup> Plaintiff/Applicant though passive in nature but was crucial as he was also the Co – Administrator to the estate of their late father together with their mother a fact which was not in dispute. He stressed that he was a necessary party to the suit. He averred that the Applicant could only seek to be removed as a party by seeking to withdraw the suit as the suit was filed by him. For this reason therefore, he could not simply withdraw from the suit.
6. He deponed that the agreement entered between him and the Applicant was vital as the same could not be used in court without calling the Applicant. It is for that reason that was why he beseeched the 1<sup>st</sup> Plaintiff/Applicant to be retained in this suit as the same could not be used in court without calling him. Indeed, the same had led to the parties living in harmony on the suit property before the filing of this present suit.

### **IV. Submissions**

7. On 24<sup>th</sup> May 2022 while all parties were present in Court, the Honorable Court directed that the Notice of Motion be canvassed by way of Written submissions. Pursuant to that the Honorable Court reserved to deliver the ruling on notice.

#### **A. The 1<sup>st</sup> Plaintiff/Applicant’s written submissions**

8. On 29<sup>th</sup> March 2022, the Learned Counsel for the 1<sup>st</sup> Plaintiff/Applicant the Law firm of Messrs. Adagi & Associates Company Advocates filed their written submissions. Mr. Adagi Advocate submitted that the application was opposed through the Replying Affidavit sworn by Edwin Amulele Ndanyi, the 2<sup>nd</sup> Plaintiff/Respondent herein. The Defendant stated in their Replying Affidavit that the 1<sup>st</sup> Plaintiff/Applicant’s presence in this suit was crucial as he was also a co - administrator to the Estate of his late father together with his mother a fact which is not disputed.
9. It was the Counsel’s submission that the Respondent being aware that the Applicant was a co - administrator to the Estate of his late father with his mother, could not have instituted this suit without the involvement or authority of his said mother. But despite all this, he had not at all indicated whether he had the authority of his mother just as he alleged to have had the authority of the Applicant.
10. The Learned Counsel submitted that the court could only summon the 1<sup>st</sup> Plaintiff/Applicant as a crucial witness and which could only happen during the trial in exceptional circumstances. However, this could not happen as a party since the court had no mandate to choose which parties to be enjoined



in a suit for parties. The Respondent had the right to apply to have the Applicant enjoined to the suit as a necessary party if he so wished or have him summoned to appear as a witness but not otherwise.

11. The Learned Counsel submitted that the Respondent seems to be in agreement that the Applicant can seek to be removed as a party to the suit hence the Applicant prayer to that effect ought to be granted. The Applicant did not wish to participate in an incompetent suit where both him and the Respondent lacked the locus standi to institute.
12. The Learned Counsel submitted that the Respondent had not endeavored to show the vital agreement he purports to have entered into with the Applicant and the contents thereof with regards to this suit and in the circumstances. In the absence of the said vital agreement, the Applicant was unable to appropriately respond and submit on this contention was unfounded,
13. The Learned Counsel submitted that the Respondent by admitting that the 1<sup>st</sup> Plaintiff/Applicant and his mother were co - administrators of the Estate of his late father seemed to be confirming that there was a Succession Petition pending somewhere in court and therefore it would have been more prudent for the Respondent to raise any disputes over the deceased's estate in the pending case if any. In addition, it was their submission that if indeed the Applicant was best placed to solve the issue at hand as stated by the Respondent, then the Respondent ought to have first approached the Applicant on a possible amicable settlement of his grievances other than rushing to institute this suit in court which clearly may embarrass and delay matters regarding the Estate of the deceased herein.
14. The Counsel submitted that it was to be noted that no such annexure marked as "EAN – T" was annexed to the Respondent's supporting affidavit and neither was any agreement. The said annexures marked as "EN -1" referred to a copy of minutes which do not at all amount to any agreement or give any authority to the Respondent to file this suit on behalf of the Applicant. This contention by the Respondent was a confirmation that in deed the Respondent did not have the written authority of the Applicant to file this suit but acted on the assumption that the purported agreement acted as a green light for him to file this suit. The Learned Counsel made reference to Order 1 Rule 13 (1) & (2) of the [Civil Procedure Rules](#) 2010 which provides that:

- "(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."

15. The Learned Counsel also submitted that Order 4 Rule 1(2) & (3) stipulates as follows:-

- "(2) The plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule 1(1) above.
- (3) Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others."
- (6) The court may of its own motion or on the application by the Plaintiff or the Defendant order to be struck out any Plaint or Counterclaim which does not comply with sub - rule (2)(3).



16. The Learned Counsel concluded by submitting that there was no proof that the Applicant authorized the Respondent in writing or in interim. The Respondent therefore had no “locus standi” to institute this suit unless the said Co - administrators were discharged, the suit was thus incompetently and improperly before this court. Hence, the same too had to be struck out. It was the Applicant’s submission that the Notice of Motion application dated 7<sup>th</sup> February 2022 was merited and ought to be allowed with costs.

## V. Analysis and Determination

17. I have read and considered the application herein, affidavit in support and the responses thereto. I have considered the written submission of both parties. In order to arrive at an informed, just and fair decision, the Court has framed the following issues for its determination. These are:-
- a. Whether the suit instituted before this honorable court by the 2<sup>nd</sup> Plaintiff through a Plaintiff by and/or on behalf of the 1<sup>st</sup> Plaintiff was proper and in compliance with the provisions of Order 1 Rule 13 of the *Civil Procedure Rule* 2010?
  - b. Whether the Notice of Motion application dated 7<sup>th</sup> February, 2022 by the 1<sup>st</sup> Plaintiff/Applicant herein has any merit whatsoever.
  - c. Who will bear the Costs of the Application.

### Issue No. a). Whether the suit instituted before this honorable court by the 2<sup>nd</sup> Plaintiff through a Plaintiff by and/or on behalf of the 1<sup>st</sup> Plaintiff was proper and in compliance with the provisions of Order 1 Rule 13 of the Civil Procedure Rule 2010?

18. The Plaintiff filed by and/or on behalf of the 1<sup>st</sup> Plaintiff/Applicant herein relates to the two (2) Plaintiffs. In this regard, it was expected that the Plaintiff under reference shall be verified by 2 Verifying Affidavits, each sworn by every individual Plaintiff in accordance to Order 4 Rule 1(3) of the *Civil Procedure Rules* 2010. On the other hand, it was also possible to have the Verifying Affidavit sworn by one Plaintiff, provided however that such Plaintiff was duly authorized by the rest of the Plaintiff in the matter. Nevertheless, before a single Plaintiff is authorized and/or mandated to swear the Verifying Affidavit on behalf of the other Plaintiff, it is incumbent upon the remaining Plaintiff, on whose behalf the Verifying Affidavit is being sworn to execute an authority, which must be in writing and duly signed. On the other hand, the written authority, executed by the rest of the Plaintiffs, in terms of the preceding paragraphs must be duly filed and/or lodged alongside the pleadings as per Order 1 Rule 13 (2) of the *Civil Procedure Rule* 2010.
19. Perhaps, it is necessary to reproduce the provisions of Order 1 Rule 13 (2) of the *Civil Procedure Rule* 2010, to appreciate and to understand the import and tenor thereof. For clarity, the provisions of Order 1 Rule 13 (2) of the *Civil Procedure Rules* 2010, are as hereunder:-
13. Appearance of one of several plaintiffs or defendants for others (Order 1, rule 13.)
- (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.



20. Despite the clear provisions of the law, which have been alluded to herein before, the 1<sup>st</sup> Plaintiff herein, did not execute and/or sign any authority to mandate the 2<sup>nd</sup> Plaintiff to swear the Verifying Affidavit and/or otherwise act on his behalf. In my humble view, the failure to generate, execute and/or sign any such authority, either as required under the law or at all renders the suit filed by and/or on behalf of the 1<sup>st</sup> Plaintiff herein, fatally incompetent.

21. The Honorable Court wishes to adopt and reiterate the decision in the case of “[Andrew Ireri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & others – Versus - Daniel Nganga Kangi & another](#) [2015] eKLR, where the court observed as hereunder;

“The Plaintiffs herein sue in their capacity as the representative of the proposed Nyangi Ndiiri Society members. The authority to sue signed by the members has not been annexed to the plaint as required by the law.

22. To fortify the foregoing observation, I would reiterate and adopt the statement of the law as espoused in the decision in the case “[Research International East Africa Limited – Versus - Julius Arisi & 213 Others](#) [2007] eKLR, where the Court of Appeal observed as hereunder:-

“In our view, the true construction of rule 1 (2) of Order VII [Civil Procedure Rules](#) is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.

**Issue No. b). Whether the Notice of Motion application dated 7<sup>th</sup> February, 2022 by the 1<sup>st</sup> Plaintiff/ Applicant herein has any merit whatsoever.**

23. Now, the Honorable Court wishes to critically assess whether the filed application dated 7<sup>th</sup> February, 2022 by the 1<sup>st</sup> Plaintiff/Applicant has any merit whatsoever. Having come to the conclusion that the verifying affidavit of Edwin Amulele Ndanyi was filed without authority of the 1<sup>st</sup> Plaintiff, having not complied with mandatory provisions of Order 1 Rule 13 of the [Civil Procedure Rules](#), 2010. The superior court however had a discretion. It had jurisdiction instead of striking out the Plaint to make any other appropriate orders such as giving the plaintiff(s) another opportunity to comply with the rule.

24. In the case of [Mohamed Bwana Obo Athman & 24 others – Versus - Kenya Airport Authority](#) [2014] eKLR, In the Environment and Land Court at Malindi, ELC No. 78 of 2014, the Learned judge Angote J. at paragraphs 16 to 20, observed as follows:-

“16. According to paragraph 4 of the Plaint, the Plaintiffs commenced the suit in which they were representing all the residents of Manda Island pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules.

17. Although the Plaint as drawn has twenty five Plaintiffs, the Verifying Affidavit annexed on the Plaint was sworn by the 1<sup>st</sup> Plaintiff alone. The said Verifying Affidavit did not make any reference to either the other 24 Plaintiffs or the residents of Manda Island. There is also no evidence that the other Plaintiffs authorized in writing the 1<sup>st</sup> Plaintiff to swear the Verifying Affidavit on their behalf or on behalf of the residents of Manda Island as pleaded at paragraph



4 of the Plaint contrary to the provisions of Order 4 Rule 3 of the Civil Procedure Rules. Order 4 Rule 3 of the Civil Procedure Rules provides that where there are several Plaintiffs, one of them, with the written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.

18. Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules provides that where there are more Plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceedings, and the authority shall be in writing signed by the party giving it.
  19. The 1<sup>st</sup> Plaintiff did not state on whose authority he signed the Verifying Affidavit and the Supporting Affidavit in support of the current Application.
  20. In view of the fact that it was averred at paragraph 4 of the Plaint that the suit was a representative suit, in the absence of the written authority by the residents of Manda Island, the suit as currently filed is a non-starter.”
25. While in the case of *Abdulla Absbir & 38 Others – Versus - Yasmin Farah Mohamed* [2015] eKLR, H.C at Nairobi (Milimani) Civil Suit No. 165 of 2015, the learned judge Mabeya J. when he was confronted with similar situation as is in the instant case he delivered himself at length, at paras 9 to 17, as follows;

“9. Before considering the application on merit, I think it is important to deal with the issue of lack of authority in filing the current suit is capable of disposing off the matter. Mr. Muragara, Learned Counsel for the Respondent submitted that the 1<sup>st</sup> Applicant having no authority of the other 38 Applicants to bring the current suit in the suit and the application are incompetent and the application should be dismissed on that ground alone. Ms Asli submitted that although no authority had been executed by the other Applicants, the 1<sup>st</sup> Applicant had sworn in the Verifying Affidavit that he had the authority of the other 38 Applicants to swear the Verifying Affidavit on their behalf.

10. Order 1 Rule 13 of the Civil Procedure Rules provides:-

“13. Where there are more Plaintiffs than one, any one (1) 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.” (Emphasize added)

11. In *Chalicha Farmers Co-operative Society Limited – Versus - George Odhiambo & 9 others* (1987) eKLR, the Court of Appeal observed on representative suit thus:-

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances



and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the Plaintiff's witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first Respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 Rule 8 or Rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The Trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the Plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.”

12. From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority, must be filed in the proceeding.
13. From the *Chalicha Farmers case* it would seem that lack of such an authority does not necessarily void the proceedings, what it does is to incapacitate the person purporting to represent his co-parties from so doing. The case by his co-parties remain unprosecuted. They have to appear themselves and prosecute the matter.
14. In the present case, it is not in dispute that the 1st Applicant did not get any authority from the 2nd to the 38th Applicant to represent, appear, act or plead on their behalf. There is no written authority signed by them and filed in court. Order 1 Rule 1(2) and (3) of the Civil Procedure Rules provides that:-
  - (2) The Plaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in Rule 1(1) (f) above.
  - (3) Where there are several plaintiffs, one of them, with written authority filed with the Verifying Affidavit, may swear the Verifying Affidavit on behalf of the others” (Emphasis mine)
15. From the foregoing, it is quite clear that a Plaint must or should be accompanied by a Verifying Affidavit. In this regard, the Plaint in this case as relates to the 2nd to the 39th Applicants is incompetent having been filed without authority. The Plaint in respect to their claim was never



accompanied with any Verifying Affidavit. That incompetence however is not fatal. ( Agricultural Finance Corporation & another – Versus - Drive-In Estate Development Limited (2006) eKLR.) The lack of a proper, valid or any Verifying Affidavit does not render a Plaint void, it only renders it voidable. This is so by virtue of Rule 1 (6) of Order 4 which provides that a Plaint that does not comply with, inter alia, sub-rules (3) and (4) may be struck out by the Court on its own motion or on application by any party. Since the 2nd to 39th Plaintiff can regularize the position by filing compliant Verifying Affidavits, and there being no application before me to strike out the Plaint, I will leave it intact and make no comment on it as regards the affected Plaintiffs.

16. Does the defectiveness of the Plaint as aforesaid, make the application incurably defective or incompetent. I do not think so while it may well be that the application as related the 38 affected Applicants is defective. It does not affect the position of the 1st and 5<sup>th</sup> Applicants. To that extent, I hold that the application as relates the 1st and 5th applicants competent as they properly swore the Affidavit in support thereof. The two are hereinafter referred to as “the applicants”.
17. On the other hand in paragraph 1 of the Supporting Affidavit the 1st Applicant states that he is authorized by the rest of the Applicants to swear the Affidavit on their behalf. Whilst there is no requirement in applications that authority to swear Affidavits be in writing or be filed, I think that there having been no original authority signed and filed as relates the suit, that averment is not adequate and is of no consequence. It cannot save the position of the rest of the 37 Applicants who never swore any Affidavit in support of the application. Accordingly, their application is hereby struck out.”

#### **Issue No. c). Who will meet the Costs of the Application.**

26. The issue of Costs which is the end product after any litigation is at the discretion of the Honorable Court. Section 27 (1) of the *Civil Procedure Rules*, 2010 provides that Costs follow the event. The event in this case is the result of the litigation process.
27. In this case the application by the 1<sup>st</sup> Plaintiff/Applicant is found to bear merit and therefore the Costs of the struck-out claims should be awarded to both the 1<sup>st</sup> Plaintiff/Applicant and the Defendant who participated in the process.

#### **VI. Conclusion & Determination.**

28. In view of the foregoing decisions of the High Court, it is quite clear that the High Court appears to exhibit a conflicting position on whether a party acting on behalf of others without an express written authority renders a suit a non-starter.
29. Nonetheless, in a nutshell, it is my finding and holding that the suit by and/or behalf of the 1<sup>st</sup> Plaintiff is not duly verified, in accordance with the law. Consequently, the suit filed by and/or behalf of the 1<sup>st</sup> Plaintiff be and should be hereby struck out. For avoidance of doubt these are the orders of this Honorable Court:-
  - a) That the Notice of Motion application dated 7<sup>th</sup> February 2022 be and hereby merited and hence is allowed.



- b) That the suit instituted by the 2<sup>nd</sup> Plaintiff enjoining the 1<sup>st</sup> Plaintiff be and is hereby found to be incompetent, premature and legally untenable. Thus suit by and/or on behalf of the same 1<sup>st</sup> Plaintiff be and are hereby struck out.
- c) That for expediency the suit by the 2<sup>nd</sup> Plaintiff against the Defendant to be heard and determined within the next one hundred and eighty (180) days. The matter be mentioned on 28<sup>th</sup> September, 2022 for Pre – trial conference session under Order 11 of the Civil Procedure Rules, 2010 and fixing a hearing date along this stringent timeframe.
- d) That Costs of the struck-out claims be awarded to the 1<sup>st</sup> Plaintiff/Applicant and the Defendant.

30. It is so ordered accordingly.

**RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF JULY, 2022.**

**HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

In the presence of: -

M/s. Yumnah Hassan, Court Assistant.

M/s. Layoo Advocate holding brief for Mr. Adagi the 1<sup>st</sup> Plaintiff/Applicant.

Mr. Edwin Ndanyi, in person - the 2<sup>nd</sup> Plaintiff/Respondent

M/s. Obura Advocate holding brief for Mr. Kariuki Kiarie for the Defendant.

