



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**Civil Case 20 of 2008**

1. DANIEL ELVIS MWAYAYA
2. JUMA MWAYAYA MBURA
3. MWAYAYA SIFA MBURA .....PLAINTIFFS

**VERSUS**

1. KITSAO NDALE
2. SILA KITSAO NDALE
3. JOHN KITSAO NDALE
4. SAMWUEL KAZUNGU MATSIKITSA
5. KARISA MWANDORI .....DEFENDANTS

**R U L I N G**

By a plaint dated 11<sup>th</sup> April 2008, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs sought the following reliefs from the defendants:-

(a) Vacant possession of Plot No. L.R. Kilifi/Chilulu/296.

(b) Costs of the suit.

At paragraph 10 of the said plaint, the plaintiff pleaded thus:

**“The plaintiffs aver and maintain that there is  
no other suit pending in any court over the  
same subject matter between the same parties,  
neither has there been any suit involving the  
same, save for a suit being SRMCC No.103/2007,  
Kaloleni, which was struck out for want of  
jurisdiction”.**

The said plaint is supported by an annexed verifying affidavit of **Daniel Elvis Mwayaya** sworn on the 11<sup>th</sup> day of April 2008.

The pertinent paragraphs of the said verifying affidavit states at paragraph 1:

“(1) That I am the plaintiff herein and have authority from the other plaintiffs herein to swear this affidavit on my own behalf and on behalf of the other plaintiffs herein”.

Simultaneously with the filing of the suit, the plaintiff filed an application under order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules and Sections 3A and 62(2) of the Civil Procedure Act (Cap 21) Laws of Kenya seeking a temporary injunction order of this court to restrain the defendants from entering, invading, trespassing and/or erecting structures on Plot No. Kilifi/Chilulu/296 and/or dealing with the suit property in any manner detrimental to the rights and interest of the plaintiffs/applicants pending the hearing and determination of the suit.

At paragraph 1 of the supporting affidavit, 1<sup>st</sup> applicant **Daniel Elvis Mwayaya** the applicant deponed as follows:-

**“ I am the 1<sup>st</sup> plaintiff herein and have  
authority from the other plaintiffs herein  
to swear this affidavit on my own behalf  
and on behalf of the other plaintiffs  
herein”.**

At the hearing, the respondents’ advocate raised a preliminary objection, by a notice thereof, dated 7<sup>th</sup> May, 2008 in the following terms:

(1)That the application and suit amount to a gross abuse of the court process as it offends the mandatory provisions of order VII Rule 1(2) of the Civil Procedure Rules.

(2) That the suit in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs is incompetent and defective as it does not satisfy the requirements of order VII Rule 1(2) of the Civil Procedure Rules.

(3)That the suit is wrongly filed in Malindi in breach of the provisions of section 11, 12 and 13 of the Civil Procedure Act in terms of the geographical location of the subject matter.

Counsel for the respondents, Mr Jumbale, at the hearing only restricted himself to ground one and two of the preliminary objections.

In a nutshell counsel contended that the application and the suit is defective and hence incompetent in that there are three plaintiffs/applicants. Yet the verifying affidavit annexed to the plaint is sworn by the first plaintiff/applicant only.

Concomitantly, the supporting affidavit to the injunction application is sworn only by the first applicant. Yet there are three applicants.

As matters stand, the suit offends the provisions of order VII Rules (1) (2). The plaint ought to have been verified by an affidavit of all the plaintiffs. The second and 3<sup>rd</sup> plaintiffs have not sworn a verifying affidavit. They have not given any written authority to the first plaintiff to swear affidavit on their behalf.

Equally, in the supporting affidavit to the injunction application it is deponed that the first plaintiff has the authority of the second and third applicants. Yet there is no written authority of the second and third applicants as enjoined by the provisions of order 1 Rule 12, which is necessary if the applicants have not sworn the affidavit.

I am grateful to counsel for their input in law and particularly the authorities cited before me even though I have not quoted the same in extenso.

Order VII Rules 1(2) provides:

**“ The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying  
the correctness of the averments  
contained in the plaint”.**

It is common ground that the plaintiffs are three. While there is a verifying affidavit of the first plaintiff there is no verifying affidavit of the second and third plaintiffs. In the absence of such written authority filed with the plaint, I take the position that the suit offends the mandatory provisions of order VII Rule 1(2) of the Civil Procedure Rules. It is thus incompetent and is for striking out.

In the result the entire suit and the application for injunction based on it is incompetent and is struck out with no orders as to costs.

Dated and delivered at Malindi this **6 M AY** 2009.

**N.R.O. OMBIJA**

**JUDGE**

**Mr. Mwadilo for Kenga for Plaintiff**