



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENTAL DIVISION**

**Civil Suit 456 of 2010**

**1. JAMES BILLY**

**O. ANUNDA - CHAIRMAN**

**3. NJOKI WAINAINA -TREASURER.....PLAINTIFF**

**VERSUS**

**EMBAKASI DEVELOPERS LTD.....1<sup>ST</sup> DEFENDANT**

**RULING**

The grounds for the application are that the suit properties belong to the 1<sup>st</sup> Defendant, and the Plaintiffs have adversely been in occupation of the suit properties for a period in excess of 12 years. Further, that the Plaintiffs have done extensive developments on the said suit properties with the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and without their consent, and that on or about 25<sup>th</sup> January, 2012 the 1<sup>st</sup> Defendant invaded the said properties and attempted to evict the Plaintiffs therefrom, destroyed some of the Plaintiffs' properties, killed some of the members of the Plaintiffs and seriously injured others. These grounds were elaborated upon in the supporting affidavit sworn on 20<sup>th</sup> January 2012 by James Billy O. Anunda, the Plaintiff's Chairman.

The 1<sup>st</sup> Defendant objected to the Plaintiff's application and urged the Court to strike it out together with the Originating Summons on the following grounds:

2. In essence, the suit is a representative one and the mandatory provisions of Order 1 Rule 8 of the Civil Procedure Rules have not been complied with by the Plaintiffs.

4. A claim of land based on adverse possession of any portion of the suit properties cannot and does not lie where as in this case there is an eviction order

issued in Nairobi HCCC No. 2299 of 1999 requiring eviction of the Plaintiff during the twelve years period relied on.

Dr. Kamau Kuria, the 1<sup>st</sup> Defendant's Advocate in written submissions dated 17<sup>th</sup> February 2012 and in oral submissions during the hearing, argued on the first point of law raised of the Plaintiffs' legal personality, that the Originating Summons and affidavits sworn in support of the same and the application show that the Plaintiff is the Embakasi Jua Kali Housing Association, which is registered with the Office of the Vice President and the Ministry of Home Affairs, Heritage and Sports, and a certificate of registration showing the same is annexed. The 1<sup>st</sup> Defendant's Advocate submitted that the said association is not a corporate body, having been registered on 26<sup>th</sup> September 2000 with the Provincial Director of Social Services Nairobi Area as a local harambee self-help group, and consequently lacks a capacity to institute a suit or make an application.

The second point of law raised by the 1<sup>st</sup> Defendant's Advocate was on representative suits, and the Advocate argued that according to the Originating Summons the suit is a representative one in accordance with Order 1 Rule 8 of the Civil Procedure Rules, and the Plaintiff did not obtain the mandatory leave of the Court as held in **Campos v D'Souza (1933) 15 KLR 86**. The third point of law raised by the Defendant's Advocate is that Mr. Anunda, who swore an affidavit in support of the application, has not annexed to it a written authority of the other co-Plaintiffs authorizing him to plead the case for them as required by Order 1 Rule 13 of the Civil Procedure Rules. The Advocate in this respect relied on the authority of **Bunson Travel Service Ltd & 9 Others vs Kenya Airways Ltd, H.C.C.C. No. 304 of 2004**, in which Njagi J. struck out a suit because there was no written authority given by those whom the Court had authorized to file a representative suit.

The 1<sup>st</sup> Defendant relied on the authority of **McPhail v Persons Unknown (1973) 1 Ch. 447** for his submissions that the purported Plaintiffs are squatters on the 1<sup>st</sup> Defendant's land and that the Court should take a firm stand for the sake of law and order and to ensure the property rights of the 1<sup>st</sup> Defendant, and should dismiss the suit and application herein. The Advocate also relied on the authority of **Secretary of State for Environment, Food and Rural Affairs vs Meier & Another & Others (2009) UKSC 11** to argue that the eviction order issued in 2009 in H.C.C.C. No 2299 of 1999 applied not only to the Defendants therein but also to all the squatters in the suit properties.

The Plaintiffs' Advocate also submitted that the authorities cited by the 1<sup>st</sup> Defendant's Advocate in support for his ground that there is an eviction order issued in Nairobi HCCC No. 2299 of 1999 requiring eviction of the Plaintiffs can be distinguished as they deal with trespass, and this suit has been brought by persons who have acquired the suit properties through adverse possession, and the Plaintiffs cannot therefore be termed as squatters. The Plaintiffs also contended that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants in H.C.C.C. No. 2299 of 1999 are not members of the Plaintiff's Association and have since died, and the said suit has therefore lapsed and the eviction orders are of no consequential value. The Plaintiffs gave a detailed account of their reasons for alleging that the said eviction order was fake and a forgery, including that it was given by a Senior Deputy Registrar and not by a Judge of the High Court as is supposed to be the case, and that the said order bore a court stamp and was not under seal as required.

In **Voi Jua Kali Association -vs- Sange and others (2002) 2 KLR 474**, it was

also held by Honourable Onyango Otieno J. (as he then was) that a society, which is an incorporated association, can sue or be sued through its officials, which officials have to be named. The suit in the cases cited above were brought in the names of the unincorporated associations which is the reason why the preliminary objections on their legal personality were upheld. In the present suit, the Embakasi Jua Kali Housing Association has instituted the suit and application herein through its named officials in a representative capacity. The 1<sup>st</sup> Defendant's preliminary objection on legal personality therefore fails as the Plaintiff's suit is brought by the said officials in a representative capacity, which officials have legal personality.

8. (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.

(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.

The 1<sup>st</sup> Defendant's Advocate on the third point of law submitted that the provisions of Order I Rule 13 of the Civil Procedure Rules which were mandatory had not been complied with. Order I Rule 13 states as follows:-

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

It is not in dispute that the said Deponent swore the said affidavits, and that there is no authority by the other officials on record. In my view, the written authority of the co-Plaintiffs is a mandatory requirement which a court of law cannot overlook.

The final point of law raised by the 1<sup>st</sup> Defendant was on the effect of the eviction orders granted in H.C.C.C No. 2299 of 1999 to the 1<sup>st</sup> Defendant on the Plaintiff's adverse possession claim. The said eviction orders are alleged by the Plaintiffs to be forgeries. Conversely, the 1<sup>st</sup> Defendant has argued that the said eviction orders bind the Plaintiffs, as they are squatters on the 1<sup>st</sup> Defendants land. These are therefore contested facts which need to be ascertained at a substantive trial and not at this preliminary stage. It was held in **Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd (1969) E.A. 696.** that a preliminary objection raises pure points of law which is argued on the assumption that all the facts pleaded are correct, and it cannot be raised if any facts have to be ascertained or what is sought is the exercise of judicial discretion. It is therefore the finding of this Court that this ground of objection cannot be the subject of a preliminary objection as it does not raise a pure point of law.

1. The Plaintiffs to give notice to all persons who have the same interest in the suit and application filed herein by way advertisement in the Daily Nation Newspaper once within 30 days of the date hereof, as is required under Order 1 Rule 8 of the Civil Procedure Rules.

3. The costs of this application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this \_\_\_7<sup>th</sup>\_\_\_ day of \_\_\_May\_\_\_, 2012.

**P. NYAMWEYA**

<font new="" roman\="" face=""&quot;Times">**JUDGE**