



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 33 of 2004

GEOFFREY NDIRANGU

VERONICA NZEMBI

JACOB NZOVIA

JONATHAN MALAVU

MOHAMED SHUME

SARAH MAILU.....PLAINTIFFS

-VERSUS-

THE CHAIRMAN OF MARIAKANI JUA KALI ASSOCIATION.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

MOHAMED MURISA.....4TH DEFENDANT

RULING ON A PRELIMINARY OBJECTION

The substantive matter before the Court at this stage was the plaintiffs' Chamber Summons application of 26th June, 2007 brought under Orders 1, rule 8 and **XXXIX** rule 1 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya). After the filing of that application on 27th June, 2007 M/s. Kalama Katana & Co. Advocates filed their notice of appointment as advocates for 1st and 4th defendants (dated 3rd September, 2007).

On 11th April, 2008 M/S. Kalama Katana & Co. Advocates invited M/S. J. O. Magolo & Co. Advocates (for the plaintiffs) and the Hon. The Attorney General to the Civil Registry for a fixing of hearing date. A similar call for the taking of hearing dates at the Registry was later (9th July, 2009) made by the advocates for the plaintiff who, however, did not invite M/S. Kalama Katana & Co. Advocates; instead they invited M/s Madzayo & Mrima Advocates, and the state law office, for the fixing of a hearing date on 14th July, 2009.

On 15th September, 2009 **Mr. Mwangi Njoro**, the Principal Litigation Counsel in the Attorney-General's Office, filed a "notice of appointment" which stated: "TAKE NOTICE that the 1st and 4th defendants [the chairman of Mariakani Jua Kali Association, and Mohammed Murisa respectively] herein [have] appointed the Honourable [The] Attorney-General to act for them in this matter in place of [M/S] Kalama Katana & Co. Advocates". On that basis, the said Chief

Litigation Counsel, on 18th September, 2009 filed his invitation to the plaintiffs’ advocates to attend at the Civil Registry on 22nd September, 2009 for the purpose of taking a hearing date.

The foregoing events mark the background to the preliminary objection which counsel for the plaintiff raises. The question is whether the Attorney-General can come on record as representing the Chairman of Mariakani Jua Kali Association (1st defendant), and one **Mohamed Murisa** (4th defendant). In a suit involving Government as well as private bodies, is it permissible for the Attorney-General to act for one of the private parties? Learned counsel, **Mr. Magolo** urged that neither 1st nor 4th defendant was a Government officer, and so the Attorney-General could not appear in Court as their legal representative. Counsel submitted that the gravamen in the main cause was not being attributed to anyone acting as a public officer – and therefore there was no basis for the Attorney-General to appear as the representative of 1st and 4th defendants. In counsel’s words: “The Attorney-General, in those circumstances, cannot turn into a private advocate and act for them”.

Mr. Magolo submitted that the Commissioner of Lands and the Attorney-General were sued as parties, and that they were alleged to have given out land irregularly and that this does not grant the Attorney-General leave to represent the person alleged to have been the recipient of the land irregularly given out.

Counsel urged that the notice of change of advocates by the Principal Litigation Counsel was not in conformity with the intent of Order **III**, rule 1 of the Civil Procedure Rules; for that rule directs that private parties do appear in person, or engage an advocate; and the Attorney-General could only give the notice of the kind in question, if he would be acting for the Government, or if one or more of the persons named as defendants were Government officers.

Mr. Magolo asked that the Principal Litigation Counsel’s notice of appointment dated 14th September, 2009 be struck out.

Learned counsel **Mr. Njoroge** contended that this was not a proper preliminary objection – because “it goes far and wide to canvass facts, to support its validity”. Counsel submitted that it was impossible to argue the preliminary objection without going deep into the evidence: in particular the evidence that the Commissioner of Lands was blamed in the suit, but the suit land had been set apart for **jua kali** [informal business] enterprises; the land had been given to the poor people of Mariakani, rather than to the organized body known as Mariakani Jua Kali Association. Counsel noted that the suit land has its registered title, and the proprietor is the Government of Kenya through the Permanent Secretary, Ministry of Research, Technical Training and Technology. This is the reason, it was urged, the Attorney-General considered it necessary to come in, on behalf of all the defendants. Mr. Njoroge submitted that there was nothing in the Government Proceedings Act (Cap. 40, Laws of Kenya), and in particular in s.34(1)(e) thereof such as would affect the Government’s right to intervene in the instant matter.

The relevant decision brought by counsel before this Court is **The Attorney-General v. Kenya Commercial Bank Ltd** Nairobi Milimani Commercial Courts, Civil Suit No. 329 of 2001, in which the question was whether the Attorney-General could properly institute suit in the name of a public corporation, namely the National Irrigation Board. A relevant paragraph in that case, in the ruling of **Ringera, J** (as he then was) reads as follows:

“Nor do I accept the submission that because the Board’s property is public property and the Board itself is a public body, the Attorney-General can purport to step into its shoes and sue for and on its behalf as he purports to do here”.

Clearly, the pertinent facts in that case are remarkably different from the facts in the instant matter. It has not been disputed that the land in question in the instant matter is land bearing a title deed, and held in the name of the Government through the Permanent Secretary; and this land has been availed to artisans who fall under the notion of **jua kali**. Any legal challenge, therefore, to the relevant land title and to the manner in which that title was created, is a direct challenge to the Government position, and the Attorney-General must necessarily be involved in any legal proceedings. It follows necessarily that any other persons, even if they be persons benefiting from the land in question, are not always the ones to answer for alleged legal impropriety; but the Commissioner of Lands and the Attorney-General must constantly be involved in any such legal inquiry.

It makes sense, therefore, that the Attorney-General should see it fit, in respect of the suit land, to come in as the representative of all the defendants. Section 34(1)(e) of the Government Proceedings Act thus provides:

“Except as therein otherwise expressly provided, nothing in this Act shall –

.....

(e) affect any rights of the Government to control or otherwise intervene in proceedings affecting its rights, property

or profits....”

I hold this to be sufficient justification for the Attorney-General to come in on the side of the defendants, in the instant matter.

I therefore dismiss the preliminary objection raised by the plaintiff.

The Registry shall give a date on priority for the hearing of the plaintiff's Chamber Summons of 26th June, 2007.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 27th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Plaintiff/ Applicant: ***Mr. Magolo***

For 1st Defendants/Respondents: ***Mr. Njoroge***