



**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMASA**

**Civil Suit 33 of 2004**

**GEOFFREY NDIRANGU**

**VERONICA NZEMBI**

**JACOB NZOVIA**

**JONATHAN MALAVU**

**MOHAMED SHUME**

**SARAH MAILU.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**THE CHAIRMAN OF MARIAKANI JUA KALI ASSOCIATION**

**THE COMMISSIONER OF LANDS**

**THE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

**RULING**

In their plaint filed in this suit on 9<sup>th</sup> February 2004 the Plaintiffs claim that they were members of Mariakani Jua Kali Association. By virtue of that membership they entered Plot No. 131 Kilifi in 1972 which had been allocated to their Association and erected permanent structures which serve as both their residential and business premises. In 1996 the Chairman of the Association gave them notice to vacate the piece of land but they refused. They also claim that the Commissioner of Lands, the Second defendant, purported to allocate the same piece of land to someone else. They therefore filed this suit claiming a declaration that having occupied the land for over 12 years they are entitled to be issued with title deeds to the portions they are occupying. They also claim for an injunction to restrain the defendants from evicting them therefrom.

The first defendant who has filed defence has raised a preliminary objection challenging the competence of this suit. In the Notice of Preliminary Objection the first Defendant claims;-

- “1. THAT the Plaintiff’s suit is fatally defective  
for failure to comply with mandatory  
provisions of the law.**
- 2. THAT the Plaintiff’s suit contravenes the  
provisions of Section 7 of the Civil Procedure  
Act.**
- 3. THAT the Plaintiff’s suit time barred.**
- 4. THAT the Plaintiff’s suit is frivolous,  
vexatious and an abuse of the process of  
court and should be struck out and/or  
dismissed with costs.”**

Mr. Kalama started with ground No. 2 and argued that the verifying affidavit states that there is no other suit between the same parties over the same subject matter. He said it follows therefore that Mombasa CMCC No. 5601 of 1996 which was between the same parties over the same subject matter must have been decided and the matter is therefore *res judicata*.

In response to that Mr. Magolo for the plaintiff submitted that the matter is not *res judicata* as no decree or order has been provided showing that the matter is determined. I agree with Mr. Magolo that this is a frivolous argument. Counsel must be aware of what constitutes *res judicata*. Proof must be shown that the matter has previously been decided on merit by a court of competent jurisdiction. Counsel’s lackadaisical argument that the matter must have been decided is vacuous and must be rejected.

The second point raised by Mr. Kalama is that the claim is statute barred simply because the plaintiffs were served with notice to vacate the land in 1996. Counsel admitted, and it is stated in the first defendant’s defence, that the Plaintiffs are still in occupation in spite of that notice. It is by virtue of that occupation that the plaintiffs are claiming to be entitled to title deeds for the portions they are occupying. If they are tressspassers as claimed by the first defendant then they have been and still are trespassers. How then does their claim become time barred. This point also has no substance and is hereby rejected.

Mr. Kalama did not argue the ground that the suit is frivolous and otherwise an abuse of the process of court. He must have, on a second thought, rightly in my view, decided to abandon it. He could have not got anywhere with it.

The remaining and most important point in this preliminary objection is the first defendant’s argument that this suit is bad in law for failure to name the officials of the first defendant. The law on suits by or against societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials – **Voi Jua Kali Association –vs- Sange and others (2002) 2 KLR 474.** And the officials have to be named. Titles like Chairman, Secretary and or treasurer cannot be used as those are not legal persons either.

In this case the first defendant “The Chairman of Mariakani Jua Kali Association” that is not a legal person. I have just noted that the notice of appointment of advocate for the first defendant is in the “name of the Chairman of Mariakani Jua Kali Association.” The defence dated 24<sup>th</sup> March 2004 is also for “the Chairman Mariakani Jua Kali Association.” So as it were Mr. Kalama has no client. He should have entered appearance and filed defence in the name of the Chairman and not that mere title. He had himself

no locus in this matter. In the circumstances I hold that the suit against the first defendant is bad in law and so are the notices of appointment of advocate and the first defendant's defence. Consequently I strike them out and order that each party bears its own costs.

DATED and delivered this 30<sup>th</sup> day of November, 2005

**D. K. MARAGA**

**JUDGE**