



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

**CIVIL CASE NO. 523 OF 2001**

**MALIMUNGU JUA KALI ASSOCIATION ..... PLAINTIFFS**

**VERSUS**

**MOSES KIMUTAI CHEPKWONY & 3 OTHERS**  
**.....DEFENDANTS**

**RULING**

The Plaintiff filed a Chamber Summons pursuant to the provisions of Order 1 rules 3, 8 and 10; Order VIA rule 3, Order XXXIX rules 1, 2 and 3 of the Civil Procedure rules and Section 3 (i) of the High Court Practice and Procedure Rules.

By the said application the Plaintiff sought leave to sue on behalf of the Malimungu Jua Kali Association. The Plaintiffs also sought leave to amend the plaint, as well as an injunction to restrain the defendants from encroaching, dealing, interfering with the suit property or claiming ownership of the said property.

In response to the application, the 3rd, 4th and 5th Defendants filed a Notice of Preliminary Objection. This Ruling is thus limited to the said Preliminary Objection. By the Preliminary Objection, the 3rd, 4th and 5th Defendants state that the application ought not to be heard because the Plaintiff does not have any legal status. The said Defendants contend that the Plaintiff cannot sue on its own behalf, but could only do so through its officials.

Mr. Nganga Advocate has submitted that the Plaintiff is registered under the Societies Act, under which proceedings can only be brought by the officials of the said Association. He cited Section 4 (i), of the Societies Act (Cap.108) as the basis of his submission.

He further submitted that the application was incurably defective as leave to sue on behalf of the Association had not been granted.

Mrs Nyakundi Advocate who acts for the 1st and 2nd Defendants associated herself with the submissions of Mr. Nganga. She further submitted that the Plaintiff ought to have exhibited the constitution of the Association, so as to illustrate if the constitution stipulated that the said Association could make it legally acceptable for the applicant and the other 219 un-named persons bring these proceedings on behalf of the Association. She also argued that they could not accept to proceed with the matter whereas the Plaintiff had not put forward particulars of the 219 persons, or even information to show that the Association had been properly registered. In these circumstances, Mrs Nyakundi urged the court to dismiss the application as well as the suit.

Mr. Mwangi Advocate who appeared for the Plaintiff readily conceded that the Plaintiff was not a

legal entity that can sue or be sued in its own name. I pause here to ask the question, who exactly is the Plaintiff here? Is it Malimungu Jua Kali Association as stated in the Plaint filed in court on 29/3/2001, or is it Robert Mwaura & 299 Others (Registered as Malimungu Jua Kali Association), as now shown on the case title in the application and affidavits filed in court since 29th August 2003?

I have perused the court records carefully, but did not find any reasons for the change made to the case title, changing the Plaintiff from Malimungu Jua Kali Association to Robert Mwarua & 299 Others. I therefore, believe that the Plaintiff, at this stage of the proceedings remains the Malimungu Jua Kali Association. I believe that it is for that reason that prayer 2 of the Chamber Summons dated 29/8/03 is for leave to be granted to Robert Mwaura to sue on behalf of the members of the Association. At this point in time, I must therefore state quite categorically that the case title in the application dated 29/8/03 is completely wrong. That case title is totally misleading because “Robert Mwarua & 299 Others” are not the Plaintiff.

The Plaintiff is Malimungu Jua Kali Association, which is described in the Plaint as “a registered Jua Kali Association”. A reading of paragraphs 7 and 8 of the Plaint serves to fortify this conclusion; as the said Plaintiff is then said to have registered 300 members, who then developed the plots which are the subject matter of the suit. Indeed if Robert Mwaura & 299 Others had already become the Plaintiffs, they would not be asking this court for leave to sue on behalf of members of the Association. In conclusion of this aspect of the matter, I do now direct the parties to revert to the proper case title until the court grants leave, if the application in that regard was allowed by the court.

Reverting now to the Preliminary Objection, I note that all parties who appeared before the court are agreed that Malimungu Jua kali Association is a society that could only sue through either its officials, (according to the Plaintiff as well as the 3rd, 4th and 5th Defendants), or alternatively through such persons as may be specified in the constitution of the Association, (according to the 1st and 2nd Defendants).

I have carefully considered the Preliminary Objection. I do consider that the points raised do have some merits.

However, the said points, in my considered view, ought not to have been raised in the format of a Preliminary Objection. The application before the court is for leave to enable one named individual and 299 others to sue on behalf of the Association. To object to the hearing of that application preemptorily would be wrong. I therefore dismiss the Preliminary Objection and direct that the application be heard on its merits. In arriving at this conclusion, I have deliberately decided to withhold my thoughts on the merits of some of the submissions already advanced before the court, as I feel that that would have a direct bearing on the outcome of the substantive application. The parties are however at liberty to reiterate some of those submissions if they re so minded.

I am fully aware that costs ordinarily follow the event. However, in the light of the views I have expressed above, I do order that the costs of the Preliminary Objection abide the decision of the substantive application dated 29/8/03.

Dated at Nairobi this 10th day of February 2004.

**FRED A. OCHIENG**

**Ag. JUDGE**