



**Ndengwa v Dandora Juakali Association (Environment & Land Case
89 of 2013) [2023] KEELC 20641 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 89 OF 2013**

**JO MBOYA, J
OCTOBER 12, 2023**

BETWEEN

ROBERT MURIITHI NDENGWA PLAINTIFF

AND

DANDORA JUAKALI ASSOCIATION DEFENDANT

Who to sue in association or a society which was not a legal entity

In the instant case, the name of the society which had issued the share certificates of the suit property to the plaintiff changed to Dandora Jua Kali Association (the defendant). The plaintiff sought a declaration that he was the registered as owner of the suit property. The court held that where one was keen to sue and implead an association or a society (which were not legal entities), then the plaintiff was obliged to sue the association through the officials thereof or the registered trustees of the association, if any.

Reported by Kakai Toili

Civil Practice and Procedure – suits – institution of suits – institution of suits against associations which were neither incorporated nor body corporates and thus not legal entities - who were the proper parties to be sued where a plaintiff sought to sue an association which was neither incorporated nor a body corporate.

Brief facts

It was the plaintiff's case that upon entry into and execution of a sale agreement with the vendor, the vendor proceeded to and transferred the share certificate of the suit property to his favor. The plaintiff added that he was thereafter issued with share certificate numbers in the name of Mali Mugu Jua Kali Association Development Project. The plaintiff averred that the name of the society which had hitherto issued the share certificates changed to and became known as Kayole Junction Housing Scheme. In addition, the plaintiff averred that same was thereafter re-issued with share certificate numbers.

It was also the plaintiff's case that the name of the society/association thereafter morphed from Kayole Junction Housing Scheme to Dandora Jua Kali Association (the defendant). The plaintiff sought among other orders a declaration that the plaintiff was the registered as owner of the suit property.



Issues

- i. Who were the proper parties to be sued where a plaintiff sought to sue an association, which was neither incorporated nor a body corporate?

Held

1. The plaintiff's suit, as it stood had been mounted and prosecuted as against an association, which was neither incorporated nor a body corporate, whatsoever. Instructively, the plaintiff's suit had been mounted against an unincorporated body, which was not a legal entity known to law. The plaintiff neither tendered nor adduced before the court any document, whether certificate of registration of an association; certificate of registration of society or certificate of incorporation, if any, denoting that the defendant against whom the suit had been filed was duly registered under any legal regime.
2. From the name of the defendant, it was an ordinary association, like the ones which were ordinarily registered under the Ministry of Sports, Gender, Culture and Social Services. An association, the defendant not excepted, were never imbued or conferred with any legal capacity, to enable them to sue or be sued in its own name, whatsoever. On the other hand, where one, the plaintiff not excepted, was keen to sue and implead an association or a society (which were not legal entities), then the plaintiff was obliged to sue the association through the officials thereof or the registered trustees of the association, if any.
3. If the plaintiff was convinced that his suit lay as against the defendant, then it behooved the plaintiff to track down the names of the chairperson, the treasurer and the secretary of the association or the names of the management committee members; and thereafter to sue same on behalf of the defendant association. No legal suit could be mounted and/or maintained against a non-existent legal entity, the defendant association not excepted.
4. The plaintiff's suit, which had been mounted against an association, which was not a legal entity, was certainly misconceived and stillborn. Where a suit was mounted against a non-existent body, the defendant not excepted, such a suit was a nullity *ab initio* and thus incapable of redemption, whatsoever. The plaintiff's suit was therefore, irredeemably bad and thus legally untenable.
5. It behooved the plaintiff to tender and place before the court evidence that the defendant ever owned the suit properties and that same were duly alienated to the plaintiff's predecessor in title and by extension the plaintiff himself. The plaintiff and his witnesses tendered contradictory and inconsistent evidence before the court. However, the inherent contradiction and/or inconsistency was never resolved.
6. It was not the business of the court to choose for the plaintiff, the evidence which was palatable for the plaintiff and to disregard the contradictory aspects or at all. If anything, the obligation to synchronize the evidence to be placed before the court lay on the shoulders of the persons who would fail, if no evidence or better still, contradictory evidence was placed before the court. The totality of the evidence that was placed before the court, did not rise up to the standard of proof required of the plaintiff by dint of section 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.

Suit struck out with no orders as to costs.

Citations

Cases

1. Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another (Civil Appeal 64 of 2007; [2016] KECA 804 (KLR)) — Explained
2. Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & Guardian Bank Limited (Civil Appeal 64 of 2007; [2016] KECA 804 (KLR))
3. Moi, Daniel Toroitich Arap v Mwangi Stephen Muriithi & another (Civil Appeal 240 of 2011; [2014] KECA 642 (KLR)) — Explained



4. Ndirangu, Geoffrey v Chairman Mariakani Jua Kali Association & 2 others (Civil Suit 33 of 2004; [2005] KEHC 532 (KLR)) — Explained
5. Ngei II Estate Residents' Association (suing Through Mauleed Majeed Kipkoech Jasho as the Registered Official and Chairperson of the Association)) v Nairobi City County & 5 others; Broadlands Limited & 6 others (Interested Parties) (Environment & Land Petition E037 of 2021; [2022] KEELC 3205 (KLR)) — Explained
6. Voi Jua Kali Association v Sange and others ([2002] 2 KLR 474)
7. Macfoy v United Africa Co Ltd ([1961] 3 All E.R. 1169) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 159(2)(d) — Interpreted
2. Evidence Act (cap 80) — section 107, 108, 109 — Interpreted

Advocates

Mr. Samuel Mwangi for Plaintiff

JUDGMENT

Introduction and Background:

1. The Plaintiff filed and or commenced the instant suit vide Original Complaint dated the 17th January 2013; and in respect of which same sought for various reliefs touching on and/or concerning various Plots known as Plot No's Block 6- 261 and Block 6-259, (sic) which were stated to belong to Dandora Jua Kali Association.
2. Subsequently, the Plaintiff filed an amended Complaint dated the 15th December 2022; and in respect of which the Plaintiff revised the descriptive details pertaining to and concerning the Disputed Plots. For good measure, the reliefs sought at the foot of the amended Complaint are as hereunder;
 - i. A declaration that the Plaintiff is registered as owner of HDDCD001/6 Scheme Dandora Jua Kali Association Plots No's 293 and 291.
 - ii. A Permanent Injunction restraining the Defendant, the third parties, squatters and/or trespassers under its directions, its agents, servants and/or employees or in any manner howsoever from , trespassing, entering, remaining on creating nuisance on or in any way dealing with the and/or interfering with the Plaintiff's proprietorship interests and/or rights of quiet possession, occupation and enjoyment of land titles HDDCD001/6 Scheme Dandora Jua Kali Association Plots No's 293 and 291 and/or interfering with the Plaintiff's rights of quiet possession, occupation and enjoyment thereof.
 - iii. Costs of and incidental to the suit and interest at court rates.
 - iv. Any other remedy as the Honorable court may deem fit and applicable in the circumstances.
3. Upon being served with the original Complaint, the Defendant duly entered appearance, but however failed to file a Statement of Defense. Further and in addition, even though the Defendant was similarly served with the amended Complaint, same did not file any Statement of Defense to the amended Complaint.
4. Owing to the fact that the Defendant herein neither filed any Statement of Defense to the original Complaint nor the amended Complaint, the instant matter proceeded on the basis of formal proof and whereupon the Plaintiff called four (4) witnesses.



Evidence By The Parties:

A. Plaintiff's Case:

5. The Plaintiff's case gravitates and revolves around the Evidence of four (4) witnesses, namely, Robert Muriithi Ndengwa, Felister Waithera Muriithi, Samuel Waruthumu Wachira and Francis Wanyoike, who testified as PW1, PW2 and PW3, respectively.
6. It was the evidence of PW1 that same entered into a sale/purchase agreement with one Anthony Njoroge Njoki on the 14th August 2004, whereupon same bought and acquired Plots Numbers Block 5-PL-210 and 211, respectively, which Plots were previously described as falling under the auspices of Kayole Junction Housing Scheme.
7. Furthermore, the witness testified that prior to the named plots being re-arranged and re-numbered, same were previously described and known as Plots Numbers A-556-MM-464 and A-557-MM-469, respectively. In any event, the witness added that the foregoing description subsisted during the time when the Plots belonged to Mali Mugu Jua Kali Association Development Projects.
8. It was the further testimony of the witness that upon entry into and execution of the sale agreement with Anthony Njoroge Njoki, the said vendor handed over to and in favor of the witness the various documents, *inter-alia*, the Share Certificates bearing the name of Kayole Junction Housing Scheme. For clarity, the witness added that the share certificate which were handed over unto him by the vendor were Share Certificate Numbers 325 and 326, respectively.
9. Additionally, the witness testified that based on the share certificate numbers 325 and 326, respectively, the Defendant herein thereafter confirmed that the witness was indeed the lawful owner and/or proprietor of Plot numbers Block 6-261 and Block 6-259, respectively.
10. Other than the foregoing, the witness averred that the details pertaining to and or concerning the Plots which same had bought and acquired from Anthony Njoroge Njoki were realigned and re-numbered and same later on became known as HDDCC001/6 Sheme Dandora Jua Kali Association Plot numbers 291 and 293, respectively.
11. Notwithstanding the foregoing, the witness averred that even though the description and Plot numbers kept on changing; the ground relative to the suit plots remained the same and it is the witness (read, the Plaintiff) who has variously been in occupation and possession of the suit plots.
12. Be that as it may, the witness testified that despite being the lawful and beneficial owners of the suit Plots, the Defendant herein together with her agents, servants and hirelings have variously trespassed onto and interfered with the Plaintiff's occupation and possession of the suit Plots. In this regard, the witness contends that the actions and activities by the Defendant and her agents are unlawful and therefore ought to be averted.
13. On the other hand, the witness also testified that despite being the lawful and beneficial owner of the suit Plot, the Defendant herein has also failed to acknowledge his (witness) rights to and in respect of the suit property and in this respect, the witness has thus implored the Honourable court to issue a Declaratory order declaring same as the lawful and legitimate proprietor of the suit Plots.
14. Other than the foregoing, the witness herein testified that same recorded a Witness statement pertaining to and concerning the subject matter. In this regard, the witness alluded to the witness statement dated the 17th January 2023; and which witness statement the witness sought to adopt and rely on.



15. Pursuant to and at the instance of the witness, the witness statement dated the 17th January 2013; was duly admitted and constituted as the Evidence- in- chief of the witness.
16. Furthermore, the witness also alluded to the List of Documents dated the 17th January 2013; and containing four sets of documents. In this regard, the witness sought to adopt and produce before the court the named documents contained at the foot of the List of Documents dated the 17th January 2013.
17. In the absence of any objection, the documents enumerated at the foot of the List of Documents dated the 17th January 2013; were duly admitted and marked as Exhibits P1 to P4, respectively.
18. Furthermore, the witness then invited the court to take cognizance of the amended Plaint dated the 15th December 2015 and thereafter implored the Honourable court to grant the reliefs enumerated at the foot of the amended Plaint dated the 15th December 2022.
19. The Second witness who testified on behalf of the Plaintiff was Felista Waithera Muriithi. Same testified as PW2.
20. It was the testimony of the witness that same is the wife of the Plaintiff and that by virtue of being the wife of the Plaintiff, same was privy to and knowledgeable of the circumstances surrounding the purchase and acquisition of the suit plots from Anthony Njoroge Njoki.
21. It was the further testimony of the witness that upon the purchase and acquisition of the suit Plots, the vendor, namely, Anthony Njoroge Njoki, handed over to and in favor of the Plaintiff the share certificate numbers 129 and 147, respectively, in the name of Mali Mugu Jua Kali Association Development Projects; and which share certificates confirm that the Plaintiff herein was now the owner of Plot numbers A-557-MM-469 and A-556-MM-464, respectively.
22. Additionally, the witness herein also testified that subsequently the share certificate which initially bore the name of Mali Mugu Jua Kali Association Development Projects were converted to and became known as Kayole Junction Housing Scheme. In any event, the witness added that the Share certificates were thereafter varied and new share certificates were issued to and in favor of the Plaintiff. For coherence, the witness clarified that the new share certificates were now known as Numbers 325 and 326, respectively.
23. Furthermore, the witness herein also added that upon the purchase and occupation of the suit Plots, the Plaintiff and herself entered upon and took possession of the suit Plots and in any event, enjoyed peaceful possession until the 20th December 2012; when Third Parties and squatters started interfering with their occupation and possession of the suit properties.
24. Nevertheless, the witness testified that despite their efforts, that is the efforts of the Plaintiff and the witness to stop the Defendant and the Third Parties from interfering with their rights to the suit property, the Defendant herein failed to stop and thus the Plaintiff was constrained to file the instant suit.
25. Other than the foregoing, the witness alluded to the witness statement dated the 17th January 2023; and thereafter invited the court to adopt the witness statement as her Evidence. For coherence, the witness statement under reference was thereafter duly admitted and adopted as the Evidence- in chief of the witness.
26. The Third witness who testified on behalf of the Plaintiff herein was one Samuel Warutumu Wachira. Same testified as PW3.



27. According to the witness herein, same is privy to and knowledgeable of the facts pertaining to and concerning the purchase and acquisition of Plots numbers 293 and 291, respectively by the Plaintiff. Furthermore, the witness averred that he was present and witnessed the Plaintiff herein purchasing the suit plots from Anthony Njoroge Njoki on the 14th August 2004.
28. Other than the foregoing, the witness intimated to the court that same had recorded a witness statement pertaining to and concerning the dispute before the court. In this regard, the witness alluded to the statement dated the 17th January 2013; and thereafter sought to adopt and rely on the named witness statement.
29. At the request and instance of the witness, the named witness statement was adopted and admitted as the Evidence in chief of the witness.
30. However, the manner in which the named witness statement was crafted is not only curious but startling. Suffice it to point out that the witness has contended in the witness statement that he is the proprietor and beneficial owner of the suit Plots.
31. Furthermore, the witness herein has also averred that it is him who acquired the plots in question pursuant to a sale agreement dated the 14th August 2004; from one Anthony Njoroge Njoki. On the other hand, the witness herein has also averred that same (witness) is claiming an order of Injunction restraining the Defendant and any third parties from interfering with the suit plots.
32. The Fourth witness who testified on behalf of the Plaintiff is one Francis Wanyoike Gatabi. Same testified as PW4.
33. Similarly, the witness herein intimated to the court that same was present when the Plaintiff entered into the sale/purchase agreement with Anthony Njoroge Njoki on the 14th August 2004. In this regard, the witness affirm that the Plaintiff herein bought and acquired Plots numbers 293 and 291, Dandora Jua Kali Association.
34. Additionally, the witness has intimated to the court that same recorded a witness statement in respect of the subject matter and in this regard the witness drew the attention of the court to the witness statement dated the 17th January 2013. Furthermore, the witness thereafter sought to adopt and rely on the named witness statement as his Evidence in chief.
35. At the instance and request of the witness, the Witness statement dated the 17th January 2013; was adopted and admitted as the Evidence in chief on behalf of the witness herein.
36. Nevertheless, despite the witness herein being a witness on behalf of the Plaintiff, the witness statement which was adopted by the witness is also curiously worded and similarly, alleges that it is the Witness and not the Plaintiff, who bought and acquired the Suit Plots.
37. Like the Evidence of PW3, the witness statement herein also indicates that the witness beforehand is the proprietor and beneficial owner all that parcels of land referred to as Plot numbers 293 and 291, respectively.
38. Besides, the witness goes further and avers that it is him who acquired the plots pursuant to the sale agreement and transfer of shares (sic) duly entered into between himself (witness) and Anthony Njoroge Njoki on the 14th August 2004.
39. Further and in addition, the witness contends that he acquired the Plots (sic) upon the Defendants through her predecessor, namely, Kayole Junction Housing Scheme, who allegedly assured the witness



that one, Anthony Njoroge Njoki, from whom the witness bought the plots was the bona fide owner thereof.

40. Other than the foregoing, the witness ventured forward and states that it is him who is claiming an order of injunction to restrain the Defendant, her agents and Third Parties acting under the Defendant from interfering with the suit plots.
41. Despite the curious and startling averments contained in the witness statement, it is appropriate to reiterate that the witness statement under reference was duly admitted and constituted as the Evidence-in chief of the witness.
42. With the foregoing testimony, the Plaintiff's case was duly closed.

b. Defendant's Case:

43. Even though the Defendant entered appearance through the firm of M/s Kiriba & Co Advocates, the Defendant neither filed a Statement of Defense to the original Plaintiff nor to the amended Plaintiff, the latter which is dated the 15th December 2022.
44. Furthermore, the Defendant herein neither attended court nor participated in the proceedings. Consequently and in this regard, it suffices to point out that no evidence, (whether oral and/or documentary), was ever tendered on behalf of the Defendant.
45. Owing to the fact that the Defendant did not participate in the proceedings herein, the Defendant's case was similarly closed upon the closure of the Plaintiff's case.

Parties' Submissions:

46. Upon the close of the respective Parties cases, Learned counsel for the Plaintiff sought for time to file and serve written submissions. Consequently, the court proceeded to and directed counsel for the Plaintiff herein to file and serve written submissions within 7 days from the date of close of the Plaintiff's case.
47. Notably, Learned counsel for the Plaintiff duly complied and filed written submissions on behalf of the Plaintiff. For coherence, the written submissions filed by and on behalf of the Plaintiff forms part of the record of the court.
48. Instructively, the said written submissions shall be considered by the court in the course of analyzing the matter beforehand and shall be taken into account, where appropriate, with a view to arriving at a fair and expedient determination of the matter beforehand.

Issues For Determination:

49. Having reviewed the amended Plaintiff dated the 15th December 2022; together with the Evidence (both oral and documentary) on behalf of the Plaintiff and upon consideration of the written submissions filed; the following issues do emerge and are thus deserving of determination.
 - i. Whether a suit can lawfully be mounted and/or maintained against an Association like the Defendant herein or otherwise.
 - ii. In the alternative, whether the Plaintiff's suit as against the Defendant is Legally tenable.
 - iii. Further and in any event, whether the Plaintiff herein has proved his case as against (sic) the Defendant or otherwise.



Analysis and Determination

Issue Number 1 and 2

Whether a suit can lawfully be mounted and/or maintained against an Association like the Defendant herein or otherwise.

In the alternative, whether the Plaintiff's suit as against the Defendant is Legally tenable.

50. The facts of the instant matter appear simple and straight forward. For coherence, it is the Plaintiff's case that same entered into and executed a sale/purchase agreement on the 14th August 2004 with one, namely, Anthony Njoroge Njoki, (hereinafter referred to as the vendor).
51. Furthermore, the Plaintiff also testified that upon entry into and execution of the sale agreement with the vendor, the vendor herein proceeded to and transferred the share certificate to and in his favor. In this regard, the Plaintiff added that same was thereafter issued with share certificate numbers 129 and 147, respectively, in the name of Mali Mugu Jua Kali Association Development Project.
52. First forward, the Plaintiff avers that the name of the society which had hitherto issued the share certificates changed to and became known as Kayole Junction Housing Scheme. In addition, the Plaintiff averred that same was thereafter re-issued with share certificate numbers 325 and 326, respectively.
53. Other than the foregoing, it was also the Plaintiff's case that the name of the Society/Association thereafter morphed from Kayole Junction Housing Scheme to Dandora Jua Kali Association, which is the current Defendant and against whom the Plaintiff now seeks the various reliefs enumerated at the foot of the amended Plaint dated the 15th December 2022.
54. From the foregoing, it is imperative to state and observed that the Plaintiff's suit, as it stands has been mounted and prosecuted as against an Association, which is neither incorporated nor a Body Corporate, whatsoever. Instructively, there is no gainsaying that the Plaintiff's suit has been mounted against an unincorporated body, which is not a legal entity known to law.
55. Additionally, it is also important to point out that the Plaintiff herein neither tendered nor adduced before the Honorable court any document, whether certificate of registration of an Association; Certificate of Registration of Society or Certificate of incorporation, if any, denoting that the Defendant against whom the suit has been filed is duly registered under any legal regime.
56. Clearly, the court has been left to grope in darkness as to the legal status of the Defendant herein. However, from the name of the Defendant, it is not difficult to discern that same is an ordinary Association, like the ones which are ordinarily registered under the Ministry of Sports, Gender, Culture and Social Services.
57. Moreover, there is no gainsaying that an Association, the Defendant herein not excepted, are never imbued or conferred with any legal capacity, to enable same to sue and/or be sued in its own name, whatsoever.
58. On the other hand, it is also important to observe that where one, the Plaintiff not excepted, is keen to sue and implead an Association or a Society (which are not legal entities), then the Plaintiff is obliged to sue the Association through the officials thereof or better still, the Registered Trustees, of the Association, if any.



59. In my humble view, if the Plaintiff herein was convinced that his suit lies as against the Defendant, then it behooved the Plaintiff to track down the names of the chairperson, the treasurer and the secretary of the Association or the names of the Management Committee Members; and thereafter to sue same on behalf of the Defendant Association. Clearly, no legal suit can be mounted and/or maintained against a non-existent legal entity, the Defendant Association not excepted.
60. To buttress the legal position that an Association like the one beforehand cannot sue and/or be sued in its own name, it suffices to adopt and endorse the holding in the case of *Geoffrey Ndirangu versus Chairman Mariakani Jua Kali Association & 2 Others* (2005) eKLR, where the court held as hereunder;
- ‘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.’
61. Furthermore, this court has had occasion to speak to the same position in the case of *Ngei II Estate Residents’ Association suing Through Mauleed Majeed Kipkoech Jasboas the Registered Official and Chairperson of the Association versus Nairobi City County & 2 others* (UR), where the court held thus;
- “By virtue of being an association registered under the society Act, it is therefore imperative to note and/or observe that under private law the Petitioner herein is therefore not a body Corporate and hence same is not vested with Legal capacity to be sue or be sued in own name.
- In this regard, if the matter before hand was an Ordinary a civil suit, then the Association herein could not file and/or mount the suit in its own name. For clarity, the suit could only be filed in the names of the Registered Officials and/or Committee Members, albeit on behalf of the Society.”
62. Taking into account the foregoing observations, it is therefore apparent and evident that the Plaintiff’s suit, which has been mounted against an Association, which is not a Legal entity, is certainly misconceived and stillborn.
63. On the other hand, the next question that does arise is; whether a suit like the instant one, which has been commenced against a non-existent body, is curable and/or redeemable by way of amendment or otherwise.
64. Similarly, the flipside question that also arises is whether such a suit can be remedied by the invocation and application of the provisions of Article 159(2)(d) of the *Constitution* 2010; which implores courts to eschew procedural technicalities and venture to deal with Substantive Justice.
65. Arising from the foregoing questions, it is now appropriate to venture forward and to interrogate the legal status of the suit that has been mounted against a non-existent Party.
66. In answer to the two questions which have been alluded to in the preceding paragraphs, it is appropriate to take cognizance of the *ratio decidendi* in the case of *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) versus Rosaline Njeri Macharia & another* [2016] eKLR.
67. For coherence, the Court of Appeal stated and held as hereunder;



- (27) Mr. Waweru Gatonye, counsel for the appellant, conceded in his written submission that his firm made the mistake of omitting the word “Board” after the word “Fund” which resulted in the plaintiff in the suit being Deposit Protection Fund instead of Deposit Protection Fund Board. What was the legal effect of this error? First, a plaintiff is defined in Black’s Law Dictionary, Ninth Edn as “the party who brings a civil suit in a court of law”. The “plaintiff” in the struck out suit, not being a legal body, there was clearly no plaintiff in law. A “suit” that is not instituted by a plaintiff who has no legal personality cannot be said to have a plaintiff as a party and is consequently a nullity. If a suit is a nullity, it is incapable of resuscitation. No life can be breathed into it. It is dead. It does not exist and it is therefore incapable of amendment.
68. Furthermore, the court proceeded and stated as follows;
- (29) Clearly, a suit not by or against a person or a body corporate is incompetent. It is a nullity. That answers the first question. If more authority was required, the philosophy in the sagacious words of Madan, JA as he then was in *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another*, (Civil Appeal No. 37 of 1978) that “a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...”, show that only there is a suit, however poorly drafted, is amendment possible to save it. Where, as here, the suit is a nullity, there is no litigation in being in law and the issue of amendment does not arise. Madan, JA as he then was alluded to litigation which is akin to a patient who can be treated and healed. Here, the patient is in the morgue. He is dead.
- (30) In *D.T. Dobie’s* case (*supra*), there was a suit in being and the issue was whether to strike it out or not. Not so in the instant case which can be distinguished on the ground that in the instant appeal, there was no suit before trial judge. In light of this, the learned judge was correct in striking out the plaint as it had no plaintiff known to law, the Deposit Protection Fund not being a body corporate.
69. Applying the *ratio decidendi* in the foregoing decision, there is no gainsaying that where a suit is mounted against a non-existent body, the Defendant herein not excepted, such a suit is a nullity *ab initio* and thus incapable of redemption, whatsoever.
70. Consequently and in the premises, I come to the conclusion that the Plaintiff’s suit before the court, which has been mounted and maintained against an Association and which is not a legal entity, is therefore, irredeemably bad and thus legally untenable.
71. In a nutshell, the Plaintiff’s suit beforehand thus merits striking out, for being void *ab initio*. Further and in any event, it is trite and established law that one cannot put something on nothing and expect to come out with something. Surely, the something placed on nothing will collapse.
72. Before departing from the issue herein, it is appropriate to reiterate the dictum in the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning, whilst delivering the opinion of the Privy Council at page 1172 (1) said;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”



73. In simple terms, I am afraid that the Plaintiff's suit was dead long before being filed in court. Consequently, the net effect is that there was/is no suit, capable of being entertained and/or adjudicated upon by this court or at all.

Issue Number 3 Further and in any event, whether the Plaintiff herein has proved his case as against (sic) the Defendant or otherwise.

74. Other than the fact that the suit was mounted and/or filed against a non-existent legal entity which has been discussed in the preceding paragraphs, it is also appropriate to venture forward and address the issue herein albeit briefly.

75. From the Plaintiff's evidence, the suit Plots, which form the basis of the subject suit initially belonged to one, namely, Anthony Njoroge Njoki; who sold his shares to and in respect of the suit Plots to the Plaintiff.

76. Additionally, the Plaintiff testified that upon the sale of the suit plots and the transfer of the share certificate to and in favor of the Plaintiff, the Plaintiff herein became the lawful and legitimate proprietor of the suit Plots.

77. On the other hand, the Plaintiff averred that though the description and identities of the suit plots kept varying and being re-numbered, same however related to the same properties, which had been sold to and in favor of the Plaintiff by the vendor.

78. On the other hand, the Plaintiff proceeded and stated that the Defendant herein is privy to and or aware of the Plaintiff's ownership rights over and in respect of the suit property. However, despite being aware of the Plaintiff's rights to and in respect of the suit properties, the Defendant has continued to interfere with the Plaintiff's rights.

79. Moreover, the Plaintiff has also averred that other than the Defendant herein, there are also Third Parties and squatters who have been interfering with the Plaintiff's rights to and or interests over the suit property. Nevertheless, it is instructive to point out that the Plaintiff has not availed the names of the Third Parties and the squatters, who are also complained against.

80. It is important to underscore that even when a suit is not defended, like the one beforehand, it still behooves the Plaintiff to tender plausible and cogent evidence in proof of his/her case. Simply put, the fact that a suit is not defended or better still proceeds on the basis of a formal proof, does not lessen the burden of proof cast upon the Plaintiff.

81. To this end, it is instructive to reiterate the holding of the court of appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the court held thus;

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

82. In my humble view, it behooved the Plaintiff herein to tender and place before the court evidence that the Defendant herein ever owned the suit properties and that same were duly alienated to the Plaintiff's predecessor in title and by extension the Plaintiff himself.



83. Secondly, it is not lost on this court that the Plaintiff herein and his witnesses tendered contradictory and inconsistent evidence before the court. In this respect, it is worthy to recall the remarks of the court, which were expressed shortly after the adoption and admission of the Evidence of PW3 and PW4, respectively.
84. Invariably, even though PW3 and PW4 purported to have testified on behalf of the Plaintiff herein, their witness statement, which were adopted and admitted as their Evidence in chief appeared to be contradicting the Plaintiff's claim.
85. For good measure, the salient features of the Evidence of PW3 are as hereunder;
- “I am the registered proprietor and beneficial owner to all that parcel of land known as plots number 293 and 291 (the Plots). I acquired the plots pursuant to sale agreement and transfer of shares duly entered into between me and Anthony Njoroge Njoki on the 14th August 2004”
86. Furthermore, the witness statement of PW3, which was adopted as the Evidence in chief proceeds and states as follows;
- “I acquired the plots upon the Defendant through its predecessor Kayole Junction Housing Scheme warranting and assuring me that the said Anthony Njoroge Njoki from whom I bought the plots, was the bona fide beneficial owners and proprietor of the plots”.
87. On his part, PW4, namely, Francis Wanyoike also adopted his witness statement dated the 17th January 2013; and the salient features thereof replicate the ones which have been reproduced hereinbefore. For coherence, the Witness Statement and thus the Evidence- in chief of PW4 also highlights that the suit plots were bought and acquired by PW4.
88. In my humble view, there is an inherent contradiction and inconsistency in the witness statement, which were duly adopted and admitted as the evidence on the part of PW1 vis a vis the evidence of PW3 and PW4, respectively. However, the inherent contradiction and/or inconsistency was never resolved.
89. Furthermore, it is imperative to point out that it is not the business of this court to choose for the Plaintiff, the evidence which is palatable for the Plaintiff and to disregard the contradictory aspects or at all. If anything, the obligation to synchronize the evidence to be placed before the honorable court lies on the shoulders of the persons who will fail, if no evidence or better still, contradictory evidence is placed before the court.
90. In my humble view, I must state and emphasize that the totality of the evidence that was placed before the Honourable court, do not rise up to the standard of proof required of the Plaintiff by dint of Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.
91. Sadly, even though the suit herein was not defended, nay, proceeded on the basis of formal proof, the evidence placed before the court is not sufficient to warrant a positive verdict in favor of the Plaintiff.
92. Consequently and in view of the foregoing, I would similarly have come to the conclusion that the Plaintiff's case, which is wrought with and fraught of inherent contradictions, courts Dismissal.



Final Disposition:

93. From the discourse, captured and reflected in the body of the Judgment, there is no gainsaying that the instant suit was mounted and maintained against a non-existent Legal entity. Consequently and in this regard, the entire suit was void *ab initio*.
94. Arising from the foregoing, the obvious and inescapable conclusion is that the suit beforehand is premature, misconceived and thus worthy of being struck out, for being a non-starter.
95. In a nutshell, the suit vide amended Plaint dated the 15th December 2022; be and is hereby struck out, albeit with no orders as to costs.
96. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Samuel Mwangi for the Plaintiff.

N/A for the Defendant.

