**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 1899 of 1999**

**PETER MWAI ……..……. PLAINTIFF**

**VERSUS**

**ASSUMPTION SISTERS OF NAIROBI ……...…….... 1ST DEFENDANT**

**MARIE FELIX MWIKALI …….……..... 2ND DEFENDANT**

**SISTER B. KAINDA ……..……. 3RD DEFENDANT**

**FATIMA CONSTRUCTION LIMITED …….....…..… 4TH DEFENDANT**

**J U D G E M E N T**

1. The Plaintiff herein is the owner of a Roller compacting machine (hereinafter "the machine") and by his Amended Plaint dated 4 September 2000, he is seeking jointly from the Defendants, special damages at the rate of Shs. 4500/-(per day?) From 16 November 1998 until the release of the machine to him. The Plaintiff detailed that he hired the machine to the fourth Defendant for the purposes of carrying on construction work at the first Defendant's building site at Kiserian, Kajiado District. His evidence was that on 16 November 1998, the fourth Defendant and the first Defendant had a dispute as regards the construction works that the fourth Defendant was undertaking on behalf of the first Defendant. As a result of such dispute, the machine was detained on the construction site. The Plaintiff's attempts to secure the release of the machine proved to be futile even when he went along to the construction site to demand the release of the same. It was at that stage that he met the second and third Defendants whom he believed to be the representatives of the first Defendant. The Plaintiff was not privy to the construction agreement between the first and fourth Defendant and only learnt about the same after this suit was filed.

2. Advocates got involved on all sides and finally it was agreed that the machine be released by the first Defendant into the custody of the fourth Defendant following upon a letter from the Plaintiff's advocates to the Fourth Defendant's advocates dated 6 March 2000. It was not clear from the Plaintiff's evidence as to just when the machine was released but it must have been sometime in March/April 2000. At the date of delivery, the machine was found to be inoperative as it would not start. Subsequently, the machine was delivered to a firm called Ganatra Plant and Equipment (hereinafter called "Ganatra") where an assessment was carried out by Finex Assessors, on behalf of the Plaintiff, who made a report on the state thereof dated 27 April 2000. That report detailed that the machine was repairable but, according to the Plaintiff, the fourth Defendant declined to instruct Ganatra to carry out any repairs. Thereafter, the Plaintiff maintained that sometime in the year 2006 he was forced to go to pick up the machine from Ganatra who had threatened to sell it off as scrap. The Plaintiff stated that he had stored and the machine in his compound ever since but that it could not be repaired. Finally, in his evidence, the Plaintiff detailed that he had never received any monies for the machine either by way of hire charges or repair costs. He

was therefore claiming damages at the rate of Shs. 4500/-per day from the 16 of November 1998 until date of payment, the cost of the machine (as it was no longer operative and had to be written off), interest at Court rates and the costs of the suit.

3. The first, second and third Defendants did not call any witnesses. The first Defence witness was **Joseph Mururi Kamau** who was the Managing Director of the fourth Defendant. He gave evidence that he had entered into a construction contract with the first Defendant to build a vocational training centre at the first Defendant's premises at Kiserian in Kajiado District. He had needed to hire-in equipment for the purposes of undertaking the contract with the first Defendant and entered into a verbal agreement with the Plaintiff to hire the machine at a cost of Shs. 4000/- per day. DW1 referred to the Plaintiff's Affidavit sworn on 24 June 1999 in support of his Notice of Motion to have this file transferred from the Resident Magistrate's Court at Milimani. At page 3, there was a hand written note exhibited, addressed to the Plaintiff by the fourth Defendant's director one Maina which detailed that he needed the machine for about 5 days to compact the site at Kiserian. DW1 went on to say that sometime in November 1998, he could not remember when, the first Defendant terminated the construction contract and the machine was taken over by the first Defendant and locked into the building site. As far as he was concerned, the extent of the fourth Defendant's liability to the Plaintiff was for the hiring of the machine for 5 days at a cost of Shs. 4000/-per day giving a total of Shs. 20,000/-.

4. DW1 then referred to a letter dated 15 December 1998 written by the fourth Defendant's advocates at page 38 of its bundle of documents. The claim for the machine at the rate of Shs. 4000/-per day for a period of 33 days from 13 November to 15 December 1998 came to a total of Shs. 132,000/- as at that date. However, DW1 noted in his evidence that the release of the machine was authorised by the first Defendant on 15 December 1999, one full year later. He continued that he had been informed by Mr. Maina that when the latter went to collect the machine on 25 March 2000, it would not start. He stated that the assessors had authorised the repair of the machine and all that it required was servicing. In cross-examination, DW1 Was referred to the quotation from the said Finex Assessors for repair of the machine at Shs. 134,803/-. He noted that his own price quotation received was Shs. 108,000/-but produced no evidence of this figure. He then went on to say that he had authorised the repair of the machine but he had never received a bill for the same. In DW1's opinion, the Plaintiff could only claim for the loss of his machine from the first Defendant and his company's liability was only for the said 5 days hire. He recalled that the first Defendant had paid the fourth Defendant but he could not remember how much. He had called the Plaintiff to come to collect his money but he had declined. He was also unwilling to collect the machine. DW1 made the observation that he knew that the Plaintiff had joined the first Defendant to the action but that the first Defendant would not have owed monies to the Plaintiff under the machine hire contract. However, after the termination of the building contract, this would be a different story. The Plaintiff had never demanded to see a copy of the building contract.

5. The Defence also called one **Charles Mwangi Kinyua** as its second witness. His witness statement, which was freely accepted into evidence by all parties, detailed that he had hired his own in machine, concrete mixer and two vibrators to the fourth Defendant sometime in late 1998. He noted that the building contract between the fourth Defendant and the first Defendant had been terminated on 13 November 1998 and that a notice had been issued by the first Defendant to collect equipment left on site by the fourth Defendant. He had executed a release agreement dated 5 February 1999, with the first Defendant and collected his machines from the site shortly thereafter. In cross-examination, the witness stated that he knew the second and third Defendants as he had met them on site when he collected his equipment which he confirmed had been returned in good condition.

6. In his submissions, the Plaintiff detailed the following issues as being for determination by this court:

**"a. Did the Plaintiff enter into a contract with the 4th defendant;**

**b. Did the Plaintiff enter into a contract with the 1st – 3rd Defendant;**

**c. What was the contractual amount to be paid by the 4th Defendant:**

**d. When was the machine released, was the machine in working condition at the time of release and who was to incur the cost of repairs;**

**e. Did any party sign a discharge release form;**

**f. Are the 2nd and 3rd defendants representatives of the 1st Defendant;**

**g. Who is liable and how much is the Plaintiff entitled to as compensation".**

From the evidence, the Plaintiff submitted that it was obvious that the fourth Defendant had entered into a written agreement with the first Defendant for the building of a complex at the first Defendant's premises at Kiserian. The Plaintiff was not privy to this agreement and only knew of the same after this matter had come to court. He noted that the machine was released on or about 24th of February 2000 after this matter had been filed in court and through the advocates to the parties. It was clear that the machine was not in working condition. It was also clear that upon the release of the machine, the first Defendant would only release the same to the fourth Defendant not the Plaintiff. He then maintained that it was a condition that the fourth Defendant would only hand over the machine to the Plaintiff after the repairs had been carried out on the same. He further maintained that it was the evidence of DW 2 that the second and third Defendants were representatives of the first Defendant and that there was no other evidence to the contrary. Finally as regards to issue g. above, the Plaintiff maintained that all the Defendants were liable and that he was entitled to compensation of Shs. 4500/- per day from 6 November 1998 to date. Rather strangely, the Plaintiff also maintained that he was entitled to Kenyan shillings 3500/- together with interest at court rates.

7. The submissions of the first to third Defendants were filed herein on 13 March 2013. They opened by detailing that the first Defendant was described in the Amended Plaint (as well as the original Plaint) as "a church organisation registered under the Society Act and carrying on religious work in Kenya". The first to third Defendants submitted that it was trite law that a Society registered under the *Societies Act (Cap 108, Laws of Kenya)* is not a legal entity capable of suing or being sued in its name. It can only be sued through its officials. The Plaintiff had pleaded at paragraph 3 of the Amended Plaint that the second and third Defendants were office bearers of the first Defendant. It was not pleaded which offices the second and third Defendants are alleged to have been holding in the first Defendant. In the joint Defence, the allegation that the second and third Defendants were office bearers of the first Defendant was expressly denied and no attempt was made by the Plaintiff to prove the allegation. It was the first to third Defendants' submission that the failure to prove that the second and third Defendants were office bearers of the first Defendant was fatal to the Plaintiff's claim against all three Defendants. To this end, the submissions cited **HCCC No. 672 of 2007 (unreported) – Eritrea Orthodox Church v. Wariwax Generation Ltd** in which this Court (**Onyancha J.**) had followed the holding in **Free Pentecostal Fellowing in Kenya v. Kenya Commercial Bank HCCC No. 5116 of 1992 (O.S.)** detailing as follows:

**"The position in common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 of the Civil Procedure Rules. In the instant matter the suit was instituted in the name of the religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name".**

8. The first to third Defendants continued their submissions by citing the further case of **Geoffrey Ndirangu & 5 Ors v. The Chairman of Mariakani Jua Kali Association HCCC No. 33 of 2004 (Mombasa) (2005) eKLR** as per **Maraga J.** as follows:

**"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 in its name. It has to sue or be sued through its officials – Voi Jua Kali Association vs Sange & Others**

**(2002) 2 KLR 474. And the officials have to be named. Titles like Chairman, Secretary and Treasurer cannot be used, as those are not legal persons either."**

The first to third Defendants continued their submissions by detailing that the Plaintiff had no case against them on merit. In the Amended Plaint and indeed in the original Plaint, the Plaintiff had not clearly pleaded any cause of action as against the first to third Defendants. The second and third Defendants had only been referred to in paragraph 3 of the Amended Plaint in which it was alleged that they were office bearers of the first Defendant. Further, the first Defendant was only mentioned at paragraphs 7 and 8 of the Plaint at which it was alleged that it had retained and/or held the machine. This was denied by the first Defendant at paragraph 9 and 10 of the Defence. The first Defendant submitted that the machine was taken to its premises pursuant to the building contract agreement between it and the fourth Defendant. The first Defendant only dealt with the fourth Defendant as the entity who delivered the machine to its premises in accordance with the building contract entered into between them. The first Defendant was not a party to the hire agreement between the Plaintiff and the fourth Defendant and therefore could not be liable under it.

9. In the conclusion to their submissions the first to third Defendants quoted from the Ruling delivered in this matter by **Ochieng J** on 6 February 2007 in relation to a preliminary objection raised by the first to third Defendants. To my mind, that section of the learned Judge's Ruling is worth setting out as below:

**"From the aforegoing authorities it clearly emerges that although the 1st defendant herein is a registered society, it could not be sued in its own name. Therefore, much as there would appear to be issues which the society may need to respond to in the suit, the said defendant would not be able to respond thereto because the claim against the 1st defendant is not sustainable in its current form.**

**Meanwhile, as regards to the 2nd and 3rd defendants, they have denied being officials or office bearers of the Assumption Sisters of Nairobi. More significantly, the said two defendants appear to have been sued as distinct parties. That is the view that one forms from the case title. However, from the averments in paragraph 3 of the Amended Plaint, it is expressly pleaded that the 2nd and 3rd defendants were being sued in their capacity as officer bearers of the 1st defendant.**

**If the 2nd and 3rd defendants could be shown to have been the office bearers of the society, then in my considered view the plaintiff could still sustain the claim herein, provided that he effected some minor amendments to the case title.**

**As to the question whether or not the 2nd and 3rd defendants were actually office bearers of the society, it is a matter of evidence, that is not an issue which can be determined on the basis of the material now before me.**

**But if the plaintiff were to prove that the said two defendants were office bearers of the society, there would then be no need for the plaintiff to have made separate allegations against then, personally.**

**In conclusion, I find that although there is a defect in the Plaint, the said defect is not fatally defective. I also find that the suit is not an abuse of the process of the court.**

**In the exercise of the discretion bestowed upon me by the provisions of Order 1 rule 10 of the Civil Procedure rules, I direct the Plaintiff to amend the Plaint, so that the society (i.e. the 1st Defendant) is properly cited as having been sued through its named officials who are said to be the 2nd and 3rd defendants …….".** (underling ours).

The Amended Plaint was filed herein on 5 September 2000. There has been no subsequent amendment thereto by the Plaintiff despite the clear warning and direction, as above, in **Ochieng J's** said Ruling. Quite rightly, therefore, the first to third Defendants referred this Court to the well-known case of **Galaxy Paints Company Ltd v. Falcon Guards Ltd Civil Appeal No. 219 of 1998** as to the Plaintiff being

bound by his Pleading.

10. The fourth Defendant's submissions were filed herein on 28 March 2013. It repeated the issues for determination by Court as set out by the Plaintiff as above. Thereafter, it analysed the issues and the evidence. Firstly, it maintained that the Plaintiff had failed to prove that the cost of hiring the machine was Shs. 4500/-per day as opposed to DW1's evidence that the rate agreed was Shs. 4000/-per day. It maintained that the main issue to be adjudicated upon by the Court is: what is the liability, if any, of each of the litigants arising from the agreement to hire the Plaintiff's machine. After outlining the events relating to the retention of the machine by the first Defendant, upon termination of the building contract with the fourth Defendant, the first Defendant's possession of the same ran for a total of eight days from 6 November 1998 until 13 November 1998. It maintained that the Plaintiff had not shown to the Court that the fourth Defendant unlawfully, illegally or unjustifiably withheld the machine from the Plaintiff. Not unnaturally, the fourth Defendant submitted that the first Defendant, having assumed the contractor's role after it had terminated the building contract, the latter took on the liability for the machine as soon as it retained it. Thereafter, the first Defendant retained the machine effectively for 13 months and 2 days. In the opinion of the fourth Defendant, the first Defendant must assume liability for the hiring charges for this period. Referring to the Plaintiff's conduct, the fourth Defendant maintained that the choice not to collect the machine when advised so to do by the fourth Defendant, was made entirely by the Plaintiff. In this connection, the fourth Defendant submitted that the possession of, and liability for, the machine actively passed onto the Plaintiff with effect from 6 March 2000. It went on to note that from the evidence, on 25 March 2000, accompanied by the said Mr. Maina, a director of the fourth Defendant, the Plaintiff collected the machine from the first Defendant's construction site. There was no condition implied or express that the handover of the machine to the Plaintiff was to be carried out after its repair. However, the fourth Defendant noted that the Plaintiff had sent a demand letter dated 2 December 1998 to it, to hand over the machine, but the fourth Defendant had been in no position to make good that demand. The first Defendant must shoulder the liability for the period it had possession of the machine. Finally, the fourth Defendant noted that it had filed a notice of claim for full indemnity by the first Defendant against any claims made against it by the Plaintiff, as a result of the first Defendant's retention and the use of the machine.

11. Before coming to the issues as outlined by the Plaintiff in his submissions, this court must consider the position of the first to third Defendants in respect of this litigation. Certainly, I find that the Plaintiff did not enter into any contract with the first to third Defendants. Whether the first to third Defendant's rightly or wrongfully retained possession of the machine for however long it did is, in my opinion, irrelevant to the matters before me. I find and fully endorse the submissions of the first to third Defendants that the Plaintiff has failed to prove his case against any of them. As per the findings in the **Eritrea Orthodox Church, Free Pentecostal Fellowing, Geoffrey Ndirangu and Voi Jua Kali Association cases**, the first Defendant is wrongly enjoined in this suit and I strike out the same against it. I also find no proof that the second and third Defendants are officials of the first Defendant and certainly nothing has been brought before Court by way of any proof as to any personal liability falling upon them. Accordingly I also dismiss the Plaintiff's suit as against the second and third Defendants. The first to third Defendants will have their costs of this suit as against the Plaintiff.

12. Turning to the Plaintiff's suit as against the fourth Defendant, the latter seems to forget that it took possession of the machine upon hiring the same. Its loss of possession at the termination of its contract with the first Defendant was not in any way the fault of the Plaintiff. The fourth Defendant was fully aware that the machine had been detained by the first Defendant. That detention must be laid at the door of the fourth Defendant and the blame thereof cannot, in my opinion, be passed on to the first Defendant. Although, I agree, that the period of hire of the machine was only intended to be 5 days, its detention by the first Defendant obviously changed that position. Certainly, the fourth Defendant is liable to pay to the Plaintiff the costs of the hire of the machine for the said 5 days as per the oral agreement made as between Mr. Maina and the Plaintiff as evidenced by the handwritten note from Mr. Maina above referred to. To this end, I tend to believe the Plaintiff's evidence that the agreed rate was Shs. 4500/-per day as distinct from DW1's evidence that the agreed rate was Shs. 4000/-per day. The oral agreement was entered into by Mr. Maina with the Plaintiff rather than DW 1 who only related to court what he had been told by Mr. Maina. Consequently, the fourth Defendant would have had to pay the sum of Shs. 22,500/-to the Plaintiff

for the agreed period of the hire. Now the question is whether the Plaintiff is entitled tothat amount and/or any further monies, bearing in mind that the machine was released to him together with Mr. Maina on 25 March 2000. From his pleadings, the Plaintiff has assumed that the agreed rate of hire would continue until the machine was returned to him. In fact, he is claiming the daily rate of hire as per the Amended Plaint dated 4 September 2000, from 16 November 1998 until the release of the machine to him. This cannot possibly be right as it was never agreed between the fourth Defendant and the Plaintiff that the machine would be hired for that length of time.

13. Although not cited by the fourth Defendant in its submissions but by the first and third Defendants in their submissions, the case of **Galaxy Paints Company** (supra) is pertinent here. The Court of Appeal has made it very clear that:

**"It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.**

**In Gandy v. Caspair [1956] EACA 139 it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record".**

I find it extraordinary that despite the clear warning from **Ochieng J.** in his Ruling delivered on 6 February 2007, the Plaintiff herein never further amended his Plaint. Being bound by his pleadings his first claim is for:

**"Special damages at the rate of Kshs 4500/-from 16th November, 1998 until release of the machine to him."**

I have already found above that the agreed period of hire was five days with effect from 6 November 1998. That time had expired by 16 November 1998. In my opinion, the Plaintiff is not entitled to those special damages as pleaded. He may have been entitled to wrongful detention of the machine for whatever period he was kept out of possession of the same. He may also have been entitled to damages in relation to the condition of the machine when it was returned to him or even the replacement thereof. Unfortunately for him, the Plaintiff has not pleaded such and a party is bound by his pleadings. The second prayer is that the Plaintiff sought an order to have the machine released to him. That prayer has been overcome by events. The third prayer was for "Any other relief". The Plaintiff has neither submitted nor given evidence as to what such other relief he seeks.

14. The conclusion to all the above, as a result of the Plaintiff's inadequate prayers as expressed in the Pleadings, is that I dismiss his claim and this suit as against the fourth Defendant as well as the first to third Defendants as I have detailed above. The fourth Defendant will also have its costs of this suit.

**DATED and delivered at Nairobi this 4th day of June, 2013.**

**J. B. HAVELOCK**
**JUDGE**