



Kimani & 3 others (On behalf of Corner Neighborhood Residents Association) v Attorney General & 4 others (Constitutional Petition E004 of 2024) [2024] KEHC 10423 (KLR) (23 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CONSTITUTIONAL PETITION E004 OF 2024
FN MUCHEMI, J
AUGUST 23, 2024**

BETWEEN

**ERASTUS KIMANI 1ST PETITIONER
ALEXANDER MUTHEE 2ND PETITIONER
JOHN MWAURA 3RD PETITIONER
ALEXANDER MWANGI 4TH PETITIONER
ON BEHALF OF CORNER NEIGHBORHOOD RESIDENTS ASSOCIATION**

AND

**THE ATTORNEY GENERAL 1ST RESPONDENT
GREEN VALLEY RESIDENTS ASSOCIATION 2ND RESPONDENT
GREEN VALLEY RESIDENTS ASSOCIATION 3RD RESPONDENT
MINISTRY OF HOUSING & LANDS 4TH RESPONDENT
THE COUNTY GOVERNMENT OF KIAMBU 5TH RESPONDENT**

RULING

Brief facts

1. This is a ruling of the 2nd & 3rd respondents’ Notice of Preliminary Objection dated 24th May 2024 which is premised on the following grounds:-
 - a. The petition as filed herein is fatally defective in both substance and form, is a legal nullity, a nonstarter in law, incompetent and hopelessly defective craving to be dismissed ex debito justitiae.



- b. The petition filed herein is fatally defective in law as the 2nd & 3rd respondents are not a body corporate and therefore lack the fundamental legal capacity to be sued in their name;
 - c. That a society registered under the *Societies Act* Chapter 108 Laws of Kenya is not a body corporate for it to sue or to be sued as a legal personality;
 - d. That a party without legal capacity is so grave, so incompetent and that the same cannot be cured. Any proceedings emanating from it is a nullity in law ab initio;
 - e. The petition and application both dated 10th April 2024 and 11th April 2024 respectively, are therefore premature, misconceived, fatally defective, incompetent, frivolous, vexatious and an abuse of the court process.
 - f. That consequently the petition and notice of motion application both dated 10th April 2024 and 11th April 2024 respectively, are fatally defective and should be struck out with costs.
2. Parties disposed of the preliminary objection by way of written submissions.

The 2nd & 3rd Respondent's Submissions

3. The 2nd & 3rd respondents submit that they are a society registered under the *Societies Act* Chapter 108 Laws of Kenya and therefore cannot sue or be sued in their name. The only way such societies can approach the court is through their elected officials or members. Relying on the cases of Republic vs Registrar of Societies ex parte Narok Muslim Welfare Association [2017] eKLR; *Kiserian Isinya Pipeline Road Resident Association & Others vs Jamii Bora Charitable Trust & Another Civil Appeal No. 307 of 2006*; Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank HCCC No. 5116 of 1992; Islamia Madrassa Society vs Zafar Niaz & 8 Others [2021] eKLR and African Orthodox Church of Kenya vs Rev. Charles Omuroka & Another [2014] eKLR, the 2nd & 3rd respondents submit that the 3rd respondent is a society registered under the provisions of the *Societies Act* and lacks the legal capacity to be sued in any proceedings in a court of law. Furthermore, the lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court and is not a procedural issue that can be cured by Article 159 of *the Constitution*.

The Petitioners' Submissions

4. The petitioners rely on the cases of *Kyule vs Gitaari (Civil Appeal 217 of 2023)* [2024] KEHC 5819 (KLR) (23 May 2024); Oraro vs Mbaja [2005] eKLR; Martha Akinyi Migwambo vs Susan Ongoro Ogenda [2022] eKLR; Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others [2014] eKLR and Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others [2014] eKLR and submit that a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts leads to but one conclusion that the facts are incompatible with the point of law. The petitioners argue that the preliminary objection raised by the 2nd & 3rd respondents is ill conceived and born out of the improper practice of filing preliminary objections as a defense.
5. The petitioners rely on Rule 5(b) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the case of Meme vs Republic [2004] 1 EA 124 and submit that the joinder of the 2nd & 3rd respondents is necessary for the protection for the rights of the petitioners and the class of persons they represent and for the complete settlement of all the questions involved in the proceedings. Further, the petitioners argue that the 2nd & 3rd respondents have not demonstrated any prejudice they may suffer by participating in the proceedings if their joinder will be useful in having the petition determined.



6. Relying on the case of Donovan Earl Hamilton vs Ian Hayles Claim No. 2009 HCV 04623, the petitioners submit that striking out pleadings or a party in a constitutional petition should be done in the clearest of cases and this is not one such case.
7. The main issue for determination is whether the preliminary objection is sustainable.

The Law

Whether the preliminary objection is sustainable

8. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

9. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

10. Similarly the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

11. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

12. It is trite law that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

13. The petitioners in their petition and application dated 10th April 2023 have described the 3rd respondent as an association duly registered under Section 10 of the *Societies Act* and the 2nd respondent as its chairperson. Being a society under the *Societies Act*, the issue being raised in the preliminary objection is whether the 2nd & 3rd respondents can be sued in their own name.

14. It is trite law that a society is not a legal person capable of suing or be sued. Thus, a society is sued through its registered officials as was stipulated in Trustees Kenya Redeemed Church & Another vs Samuel M'Obiya & 5 Others [2011] eKLR which was cited with approval in *Omari vs Registered*



Trustees Muslim Association Mosque Committee Eldoret & 8 Others (Constitutional Petition E017 of 2021) [2023] KEHC 26117 (KLR) (1 December 2023) (Judgment) where it was held:-

It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.

15. Similarly in the case of Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No. 4116 of 1992 cited with approval in *Islamia Madrassa Society vs Zafar Niaz & 8 Others* [2021] eKLR where the court held that:-

The position at 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 Civil Procedure Rules.

16. The 2nd respondent is the chairperson of the 3rd respondent which has not been denied. The 3rd respondent is not a body corporate and the petitioners have not denied this either. The law is very clear that the 2nd and 3rd respondents are not corporate bodies. The petitioners ought to have sued the elected officials of the 3rd respondent.

17. I find the preliminary objection merited and hereby uphold it. The petition as against the 2nd and 3rd respondent is hereby struck out with costs to the said respondents.

18. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE

