



**Krystalline Salt Company Limited & 3 others v County Government of Kilifi & 2 others  
(Constitutional Petition 11 of 2021) [2023] KEHC 1068 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1068 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CONSTITUTIONAL PETITION 11 OF 2021**

**SM GITHINJI, J**

**FEBRUARY 20, 2023**

**IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2, 3, 10, 19, 20, 21,22, 23, 24, 27, 35, 40,  
47, 62 (1) (F), 62 (3), 67 (2), 93, 94 (6), 109, 110, 124, 191, 196, 201, 209, 210, 258, 259 AND 260  
OF THE CONSTITUTION OF KENYA AS WELL AS THE FOURTH SCHEDULE THERETO**

**AND**

**IN THE MATTER OF: SECTIONS 87, 88, 91 AND 104 OF  
THE COUNTY GOVERNMENTS ACT NO.17 OF 2012**

**IN THE MATTER OF: SECTIONS 125 (2) AND 207 OF  
THE PUBLIC FINANCE MANAGEMENT ACT OF 2012**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF: SECTIONS 1, 2, 3, 4, 5,6, 7, 8,9, 10, 11,  
12, 13, 14, 15, 16 AND 18 OF THE RATING ACT, CAP 267**

**IN THE MATTER OF: SECTIONS 1, 2, 3, 4, 5, 6, 7, 8, 9, 16 (5)  
AND 22 OF THE VALUATION FOR RATING ACT, CAP 266**

**AND**

**IN THE MATTER OF: KILIFI COUNTY FINANCE ACT 2018**

**AND**

**IN THE MATTER OF: ALLEGED ENACTMENT BY THE COUNTY  
ASSEMBLY OF KILIFI OF A LAW THAT IS INCONSISTENT WITH  
AND/OR IN CONTRAVENTION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ALLEGED EXERCISE OF PARLIAMENTARY POWERS  
AND AUTHORITY IN CONTRAVENTION OF THE CONSTITUTION**

**AND**



**IN THE MATTER OF: ALLEGED VIOLATION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS OF PERSONS ENGAGED IN THE BUSINESS OF  
EXTRACTION OF SALT AND THE CONSUMERS OF THEIR SERVICES**

**AND**

**IN THE MATTER OF: PUBLIC PARTICIPATION IN THE PREPARATION  
AND PUBLICATION OF KILIFI COUNTY VALUATION ROLL, 2019**

**BETWEEN**

**KRYSTALLINE SALT COMPANY LIMITED ..... 1<sup>ST</sup> PETITIONER**  
**KEN SALT COMPANY LTD ..... 2<sup>ND</sup> PETITIONER**  
**MALINDI SALT WORKS ..... 3<sup>RD</sup> PETITIONER**  
**KURAWA INDUSTRIES ..... 4<sup>TH</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KILIFI ..... 1<sup>ST</sup> RESPONDENT**  
**COUNTY ASSEMBLY OF KILIFI ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioners herein filed a petition dated September 9, 2021 seeking the following orders;
  - a) A declaration that the 1<sup>st</sup> Respondent's demand for cess of salt and in continuing to levy/charge cess fees for salt under the *Kilifi Finance Act, 2018* without a supporting legal framework expressly violates Articles 185 (2) as read together with the 4<sup>th</sup> Schedule Provision and 209 (3), 4, & 5 of the [Constitution](#) and as such is void *ab initio*.
  - b) A declaration that the First Schedule part 1, Cess on Natural Resources in the [Kilifi County Finance Act, 2018](#) is inconsistent to and in violation of Article 185 (2) as read with the Fourth Schedule and Article 209 (3), (4) & 5 and 260 of the [Constitution](#) and as such is null and void *ab initio*.
  - c) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's failure to provide the petitioners with the [Kilifi County Finance Act, 2018](#) is a violation of their right of access to information;
  - d) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed, neglected and or refused to facilitate public participation by the Petitioner owners, rate payers and or residents in Kilifi County in the process of preparing and or drafting the Kilifi County Draft Valuation Roll published on April 5, 2019 thereby violating their right to property and certainty of rates taxation by the County Government;



- e) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents decision contained in the [Kilifi County Finance Act 2018](#) and the Kilifi County Draft Valuation Roll, 2019 enhancing land rates to 1000% of the unimproved site value in so far as it applies to properties of the Petitioners was made without their involvement, consultation or participation and hence violates the constitution;
- f) A declaration that the Kilifi County Draft Valuation Roll published on April 5, 2019 in its totality is unconstitutional;
- g) A declaration that the imposition of the Kilifi County Draft Valuation Roll published on April 5, 2019 offends the established principles of taxation, to wit, equity, lack of arbitrariness, uncertainty about tax liabilities, convenience, neutrality, political responsibility and fairness which are a prerequisite for a legitimate tax system;
- h) An order of certiorari to remove into the High Court for the purpose of its being quashed Kilifi County Draft Valuation Roll published on April 5, 2019 comprising: -
  1. Draft Valuation Roll Barani Area Agricultural;
  2. Private Land Draft Valuation Roll Mtwapa Area;
  3. Private Land Valuation Roll Kilifi Mtwapa Area;
  4. Private Land Valuation Roll Roka Area;
  5. Private Land Valuation Roll Shella Area
  6. Private Land Draft Valuation Roll Watamu Township Area;
  7. Private Land Valuation Roll Gala Area;
  8. Private Land Valuation Roll Residential Mambui Township Area
  9. Public Land Valuation Roll Mazeras Area (Kenya railways);
  10. Public Land Valuation Roll Residential Baya Magonzi S.S.S.;
  11. Public Land Valuation Roll Vipingo Area.
- i) A prohibitory injunction directing the 2<sup>nd</sup> Respondent to stop the levying/charging of cess fees for salt in their area of jurisdiction.
- j) An order of prohibition stopping the certification, operationalization and/or implementation of the Kilifi County Draft Valuation Roll published on April 5, 2019;
- k) An order of mandamus directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to compel and/or require them to reinstate the existing Valuation Rolls and further initiate a transparent and accountable process of appointing a County Surveyor and developing a Valuation Roll that is accurate and complete;
- l) An order be made directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to consult with the Petitioners before enhancing land rates on their properties;



- m) The costs of this Petition be borne by the Respondents; and
  - n) Any other or further order or relief that this Honourable Court deems fit to grant.
2. The 3<sup>rd</sup> Respondent filed a PO to the Petitioners' petition on the following grounds; -
- i. That the suit filed against the Office of the Attorney general and department of Justice is erroneous, misguided and without legal basis.
  - ii. That the petitioners have no reasonable cause of action against the Office of the Attorney General and Department of Justice, the 3<sup>rd</sup> Respondent herein and the suit filed and claim brought by the petitioners against the 3<sup>rd</sup> Respondent is bad in law as set in Anarita Karimi Njeru's case.
  - iii. That the 3<sup>rd</sup> Respondent herein is not a proper respondent to the proceedings herein.
  - iv. That the suit against 3<sup>rd</sup> respondent is misconceived, an abuse of the court process and the same ought to be struck out.

### Submissions by the Parties

3. Counsel for the 3<sup>rd</sup> respondent submitted that from the prayers by the petitioner, it is clear that there is no claim or demonstration of breach filed against the 3<sup>rd</sup> Respondent as both the prayers and the body of the petition lacks precision as it fails to set out the manner in which the 3<sup>rd</sup> Respondent has breached the Petitioner's right under the *Constitution*. They relied on the authorities of *Anita Karimi Njeru* and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
4. It was further submitted that he who alleges must prove as laid out in Section 107 of the *Evidence Act* and cited the authority of *Shamsber Kenya Limited v Director of Public Prosecutions & 2 Others* [2018] eKLR.
5. Counsel also submitted that the petitioners have not established a prima facie case against the 3<sup>rd</sup> respondent as set out in the case of *Mrao v First American Bank limited & 2 Others* [2002] KLR 125. Moreover, the petitioners' alleged breach of their constitutional rights by breach of taxation principles is by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent who consist of constitutional relevant offices which can be sued in their own capacity.
6. On their part, counsel for the petitioners submitted that the 3<sup>rd</sup> Respondent is sued in its capacity as the legal advisor of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. They relied on the following authorities; *In the matter of Speaker, County Assembly of Siaya County* [2020] eKLR and *Gouriet v Union of Post Workers and others* [1977] 3 All ER 70; [1978] AC.
7. In addition, it was submitted that the court must at least look for circumstances which may favour the hearing of a suit on the merits rather than have a suit struck out on technicalities. Further, the case of *Anarita Karimi* should not be used as a yard stick for measuring the admissibility of petitions. They cited the authority of *David Ngige Tharau & 128 Others v Principal Secretary Ministry of Lands, Housing and Urban Development & 2 Others* [2016] eKLR.

### Analysis and Determination

8. I have perused through the pleadings, the submissions as well as the authorities relied on by the parties and the issue for determination is whether the PO is merited.



9. The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v Safaricom Ltd & Anor* [2020] eKLR as follows:

“[9] This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where Law JA and Newbold P (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA:

“So far as I am aware, a Preliminary Objection consists of a pure 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. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P:

“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 points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

[10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of the Constitution of Kenya 2010.

[11] In case cited by the 1st Respondent, *David Nyekorach Matsanga & Another v Philip Waki & 3 Others* [2017] eKLR, and the three-judge bench of the High Court (Lenaola, J (as he then was), Odunga and Onguto, JJ after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

“We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection 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.”



In Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated 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”

10. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
11. I am further guided by Order 2 rule 15 of the Civil Procedure Rules on when a suit can be struck out as provided below:
  - (1) 1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:
    - a) it discloses no reasonable cause of action or defence in law; or
    - b) it is scandalous, frivolous or vexatious; or
    - c) it may prejudice, embarrass or delay the fair trial of the action; or
    - d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
12. The 3<sup>rd</sup> respondent has urged that the petitioners have no reasonable cause of action against them and the suit is misconceived and an abuse of the court process. In my considered view, the Objection raised by the 3<sup>rd</sup> respondent is not on pure points of law as it's based on unsettled “facts’ and call for the court to ascertain the alleged facts. Thus, the PO herein does not meet the legal threshold and the same is hereby dismissed for want of merit with no orders as to costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Absence of; -**

**The parties.**

**They be notified.**

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**S.M. GITHINJI**

**JUDGE**

