



**Odhiambo v Machais Company Limited (Constitutional Petition E230 of 2021)
[2023] KEHC 2621 (KLR) (Constitutional and Human Rights) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E230 OF 2021**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

NICHOLAS OUMA ODHIAMBO PETITIONER

AND

MACHAIS COMPANY LIMITED RESPONDENT

RULING

1. The Petitioner herein, Nicholas Ouma Odhiambo, instituted the instant proceedings variously challenging the manner in which a public project known as Eastleigh Community and Social Hall was carried out, implemented and alleged illegally transferred into private ownership.
2. On service, the Respondent filed a Notice of Preliminary Objection dated September 9, 2021. The objection impugned the jurisdiction of this Court to hear and determine the Petition and also challenged the Petitioner's locus standi.
3. The Petitioner strenuously opposed the objection.
4. On this Court's directions, parties filed their respective elaborate written submissions. They also filed Lists of Authorities.

Analysis:

5. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.



6. The objection was tailored as follows: -

Take Notice that the Respondent herein shall at the hearing of this petition or at the earliest opportune moment raise Preliminary Objection seeking to strike out the Petition dated June 18, 2021 against the Respondent herein on grounds that

1. This honourable Court lacks jurisdiction to hear and determine this Petition.
2. The Petitioner does not have locus standi to institute this suit, and
 - a. He is not registered as a person living with disabilities; and
 - b. He is not a member of Eastleigh Association
3. The Petition and the Annexed supporting affidavit of Nicholas Ouma contravene mandatory provisions of the Evidence Act Cap 80 Laws of Kenya and Order 19 of the Civil Procedure Rules.
4. The Petition is an abuse of Court process and a complete waste of this Court's time.
5. The Petition does not disclose any reasonable cause of action against the Respondent.

7. From the reading of the objection and the submissions in support, it appears that the Respondent impugned the jurisdiction of this Court on the basis that the Petition failed to adhere to the precision test as it fails to raise constitutional issues for determination. The Respondent also challenged the Petitioner's locus standi and further took issue with the manner in which the Petitioner handled some evidential issues.

8. As the matters under consideration were raised by way of preliminary objection, it is imperative to briefly have a look at the law on preliminary objections.

9. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

10. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd*, [1969] EA 696 page 700 when the Court observed as follows: -

...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 objection may dispose of the suit. Examples are an objection to 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.

...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 issues, and this improper practice should stop.



11. In Civil Suit No 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit v West End Distributors* (*supra*) and stated as follows on the operation of preliminary objection: -

... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.
12. In *Omondi v National Bank of Kenya Ltd & Others* [2001] KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters... What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.
13. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in Petition No 7 of 2013 *Mary Wambui Munene v Peter Gichuki Kingara and Six Others*, [2014] eKLR, when the Learned Judges stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.
14. The Apex Court had earlier on in Constitutional Application No 2 of 2011, *In the Matter of Interim Independent Electoral Commission* [2011] eKLR observed as follows in regard to jurisdiction and its source: -

... Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid down in judicial precedent.
15. The Preliminary objection in this matter has three limbs. They are the failure to meet the precision test, the locus standi and the evidential challenge.
16. Given the nature of preliminary objections discussed above, it appears that the evidential challenge raised by the Respondent to the extent that the Petition and the affidavit in support infringe the *Evidence Act* and Order 19 of the *Civil Procedure Rules* cannot be entertained at this point in time. The reason is that the issue is based on disputed facts and call for further interrogation.
17. In this case, the Petitioner vehemently opposed the allegation that the Petition and the affidavit in support infringe the *Evidence Act* and Order 19 of the *Civil Procedure Rules*.
18. With such a state of affairs, the evidential challenge under the third limb of the objection is not sustainable and is hereby struck out.
19. To the contrary, the first two limbs of the objection are based on pure points of law and are capable of disposing of the Petition. As such, the limbs attained the proprietary test and ought to be determined on merit.



20. On the precision test, this Court dealt with the issue in Nairobi High Court Constitutional Petition No E406 of 2020 *Renita Choda v Kirit Kapur Rajput* [2021] eKLR. The Court stated as follows: -

33. Long before the downing of the new constitutional dispensation under the Constitution of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.

34. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as ‘the Mutunga Rules’) also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

- (a) the petitioner’s name and address;
- (b) the facts relied upon;
- (c) the constitutional provision violated;
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.

35. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.



37. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* case (supra) had the following on Constitutional Petitions: -

Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic, [1979] KLR 154*: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

38. Both parties are in agreement with what a constitutional issue is. They both referred to *Fredricks & Other v MEC for Education and Training, Eastern Cape & Others* case (supra) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

The *Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of State... the interpretation, application and upholding of the *Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the *Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

40. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the *Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters, [2007] 28 ILJ 133 (CC)*: -



... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

41. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in Rapinder Kaur Atal v Manjit Singh Amrit case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in Turkana County Government & 20 Others v Attorney General & Others case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
21. In dealing with the precision test, a look at the Petition is inevitable. In this case, the Petition has several parts. There is the description of parties, the factual background, the constitutional and statutory violations and the remedies sought.
22. The Petitioner was very clear on the cause of action, the constitutional violations and the remedies. The Petition, therefore, established the ‘link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement’. The Petition raises several constitutional issues for determination including whether the correct procedure was followed to transfer a public entity into private ownership, if at all the issue is true.
23. To that extent, the objection that the Petition was not drafted with precision as to raise constitutional issues fails and is hereby rejected.
24. The last limb is on the locus standi. The Black’s Law Dictionary, 9th Edition at page 1026 defines the term as: -
the right to bring an action or to be heard in a given forum.
25. Courts have dealt with the subject of locus standi in great detail. In Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR while referring to the matter of Ms Priscilla Nyokabi Kanyua v Attorney General & Interim Independent Electoral Commission Nairobi HCCP No 1 of 2010 asserted that: -
...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population....
26. Similarly, In Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR while canvassing the issue of locus standi the Court stated thus: -
...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”
27. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR settled the issue of locus standi in constitutional Petitions in the following manner: -
 - (28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010



by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of June 28, 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

- (29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.
- (30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.
28. The Court of Appeal, however, cautioned that: -
- (31) However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold.
29. The Petitioner is in Court by virtue of being a Kenyan, a person living with disability and a resident of Nairobi. He brought the proceedings claiming violation of various articles of the Constitution. As a resident of Eastleigh, he stands to benefit from the impugned facility which is allegedly now in the hands of a private individual.
30. Pursuant to Articles 22 and 258 of the Constitution as well as the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, the Petitioner is entitled to maintain the instant proceedings.



31. There is no contention that Petitioner is not acting bona fide with a view to vindicating the cause of justice. There is also no contest that the Petitioner brought the Petition for personal gain or private profit or out of political motivation or other oblique consideration.
32. Given the state of affairs, this Court finds and hold that the Petitioner is seized of the requisite locus standi to sustain the proceedings.

Disposition:

33. Deriving from the above discussion, it is apparent that all the three limbs of the objection have failed.
34. Consequently, the following final orders do hereby issue: -
 - a. The Notice of Preliminary Objection dated September 9, 2021 is unsuccessful and is hereby dismissed.
 - b. The costs of the objection shall be in the Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023.

A C MRIMA

JUDGE

Ruling No 1 virtually delivered in the presence of:

N/A for parties

Regina/Chemutai – Court Assistant**

