



**Kirigua & 2 others v Sikalie & 3 others; I&M Bank Ltd & another (Interested Parties)
(Civil Case E068 of 2022) [2023] KEHC 21826 (KLR) (Civ) (8 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E068 OF 2022

AN ONGERI, J

AUGUST 8, 2023

BETWEEN

**PETER KIRIGUA 1ST PLAINTIFF
GACIKU MUHU 2ND PLAINTIFF
HENRY OGOYE 3RD PLAINTIFF**

AND

**SAMORA S SIKALIE 1ST DEFENDANT
MBURU NGUGI 2ND DEFENDANT
DON SMITH 3RD DEFENDANT
KAREN LANGATA DISTRICT ASSOCIATION 4TH DEFENDANT**

AND

**I&M BANK LTD INTERESTED PARTY
THE REGISTRAR OF SOCIETIES INTERESTED PARTY**

RULING

1. The learned senior counsel for the 1st to 4th defendants/ respondent filed a preliminary objection dated 17/4/2023 in the following terms

Take notice that 1st to 4th defendants shall raise the following preliminary objection to the Notice of Motion dated April 11, 2023 and the Plaint dated April 11, 2023 on the following grounds and seeks the striking out of the pleadings with costs.



4th defendant is an Exempt Society

1. The 4th defendant having been issued with a Certificate of Exemption from Registration No. 101 on March 23, 1971 under section 10 of the Societies Act is an exempt society whose elections are conducted under its constitution and not under the supervision of the 2nd Interested Party who has no mandate to supervise its elections or interfere with its daily operations.
2. Section 19 of the Societies Act and the Schedule of the Act provide that elections for an exempt society are strictly in accordance with the exempted society's constitution and the Registrar has no authority to interfere with an exempted society's constitution.
3. It is unconstitutional and contrary to article 36 of the Constitution to seek to wind up the 4th defendant without due process and right to a fair hearing.

Res judicata and collateral attack on consent order in E171 of 2022 to hold elections in March 2023

4. The adjourned Annual General Meeting of 7th April 2023 was held in strict compliance with its constitution and the express consent order in Nairobi HCCC No. E171 of 2022 Samora M Sikalieh, Chairman Karen Langata District Association (KLDA) v Murtaza Mohammed Ali & 2 Others where the parties agreed that the Annual General Meeting would be held in March 2023 as required by the Constitution and appointment of interim members would cease at the Annual General Meeting and upon election of the Committee Members for the year 2023-2024.
5. The matter is res judicata as the elections were conducted strictly in accordance with the court order and the Constitution of the 4th Respondent.
6. No special circumstances exist to grant mandatory, declaratory and final orders in an interlocutory application.

No locus standi and material non-disclosure

7. The Plaintiff discloses no cause of action to interfere with the operations of the 4th defendant which is an exempt society.
8. The plaintiffs are guilty of serious material non-disclosure for failing to produce the Certificate of Exemption from Registration No. 101 on 23rd March 1971.
9. The 1st plaintiff has never been a member of the 4th defendant and has no locus standi to swear the Supporting Affidavit dated April 11, 2023 and is guilty of serious material non-disclosure. Perjury
10. The 1st plaintiff is guilty of perjury and lying under oath for the following reasons in his supporting affidavit:



- a. Paragraph 2: lying under oath that he is a member of the 4th Respondent without production of any evidence of membership.
 - b. Paragraph 4: Purporting to campaign for elections with non-members of the 4th defendant.
 - c. Paragraph 7: lying that his name was not in the register of members when at all material times he was never a member of the 4th Respondent.
 - d. Paragraph 8: lying that violence and intimidation was meted out against him without any evidence whatsoever.
 - e. Paragraph 18: seeking orders affecting the 4th Respondent when he has no locus standi as a member to seek any orders from court affecting its affairs.
 - f. Interfering with the elections of the 4th defendant by inviting the Registrar of Societies to purportedly oversee its elections when he was not a member.
11. Peter Kirigua must be cross examined under oath to lay the basis for his prosecution for perjury by the Criminal Investigation Department pursuant to Section 114 of the Penal Code that states:

“Any person who swears falsely or makes a false affirmation or declaration before any person authorised to administer an oath or a declaration upon a matter of public concern, and at such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour.”

Conflict of Interest and failure to disclose pending suit and consent calling for elections

12. The firm of Mereka & Co is conflicted as David Mereka will be summoned as a witness by the 1st to 4th defendants and will be personally sued in the intended Defence and Counterclaim if the suit is not struck out, for causing loss and damage to the 4th defendant and colluding with the Registrar of Societies to interfere with the operations of an exempt society and failing to disclose Constitutional Petition No. E299 of 2022 David Mukii Mereka v Samora M Sikalieh -Chairman of Karen Langata District Association that is pending against Karen Langata District Association over his removal as secretary to the society and where he seeks substantial damages.



13. Mereka and Company are estopped from deviating from the express terms of the consent in Nairobi HCCC No. E171 of 2022 Samora M Sikalieh, Chairman Karen Langata District Association (KLDA) v Murtaza Mohammed Ali & 2 others where the consent expressly ordered that the Annual General Meeting would be held in March 2023 as required by the Constitution and the appointment of interim members would cease at the Annual General Meeting and upon election of the Committee Members for the year 2023-2024.
 14. It is a contravention of Rule 9 of the Advocates Practice Rules for David M Mereka through his firm to remain on record as David Mereka cannot be advocate on record and witness at the same time and be subjected to cross-examination on the following:
 - a. The consent in Nairobi HCCC No. E171 of 2022 Samora M Sikalieh, Chairman Karen Langata District Association (KLDA) v Murtaza Mohammed Ali & 2 others.
 - b. Being sued as a defendant in the intended counterclaim in the present suit for causing financial loss to the 4th Respondent and interfering with its elections and the will of its members.
 - c. Constitutional Petition No. E299 of 2022 David Mukii Mereka v Samora M Sikalieh -Chairman of Karen Langata District Association.
2. The parties filed written submissions in the notice of preliminary objection which I have duly considered.
 3. The issues for determination in this preliminary objection are as follows;
 - i. Whether the notice of preliminary objection meet the legal threshold for preliminary objections.
 - ii. Whether this matter is res judicata.
 - iii. Whether the 4th defendant is an exempt society.
 - iv. Whether the plaintiff's counsel failed to comply with Order 9 of the Civil Procedure Rules.
 4. I find that the issues the 1st to 4th defendant/applicants have raised in this preliminary objection require to be canvassed by adducing evidence before the same can be determined.
 5. The said issues cannot be dealt with conclusively at this stage since they involve facts which have to be ascertained.
 6. In the case of Mukhisa *Biscuit Manufacturers Ltd v West End Distributors Ltd* [1969] EA 696 – the Court of Appeal said as follows;

“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 the costs and on occasion, confirm the issues. This improper practice must stop.”

7. The preliminary objection dated 17/4/2023 is accordingly dismissed with no orders as to costs and parties directed to file written submissions in the application dated 11/4/2023.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF AUGUST, 2023.

A. N. ONGERI

JUDGE

