



Mayende t/a Engo Garage v Bumula Sub-County Hospital; Republic (Applicant); Bumula Sub-County Hospital & another (Respondent); Mayende t/a Engo Garage (Exparte); Chief Officer Ministry of Health in the County Government of Bungoma (Interested Party) (Judicial Review 33 of 2023) [2023] KEHC 26128 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

JUDICIAL REVIEW 33 OF 2023

REA OUGO, J

NOVEMBER 28, 2023

IN THE MATTER OF AN APPLICATION BY JULIUS WANJALA

MAYENDE T/A ENGO GARAGE FOR ORDERS OF

MANDAMUS

AND

IN THE MATTER OF CHIEF MAGISTRATE COURT AT

BUNGOMA CIVIL SUIT NO. 207 OF 2022

IN THE MATTER OF THE CIVIL PROCEDURE ACT CHAPTER 21 LAWS OF

KENYA, THE CIVIL PROCEDURE RULES 2010 AND IN THE MATTER OF

THE COUNTY GOVERNMENT ACT, 2012

BETWEEN

JULIUS WANJALA MAYENDE T/A ENGO GARAGE PLAINTIFF

AND

BUMULA SUB-COUNTY HOSPITAL DEFENDANT

AND

REPUBLIC APPLICANT

AND

BUMULA SUB-COUNTY HOSPITAL RESPONDENT

MINISTRY OF HEALTH BUNGOMA COUNTY RESPONDENT

AND



JULIUS WANJALA MAYENDE T/A ENGO GARAGE EXPARTE

AND

**CHIEF OFFICER MINISTRY OF HEALTH IN THE COUNTY GOVERNMENT
OF BUNGOMA INTERESTED PARTY**

RULING

1. The ex-parte applicant filed a judicial review application before the court seeking an order of mandamus against the interested party to direct him to satisfy the decretal sum of Kshs. 262,188/- plus accrued interest in Bungoma CMCC No. 207 of 2022.
2. Subsequently, the respondent and interested party filed a notice of preliminary objection on grounds that the ex-parte applicant's application is misconceived, frivolous and devoid of merit for reasons that the ex-parte applicant failed to enjoin the rightful legal entities in the Bungoma Civil Suit No 207 of 2022.
3. In their submissions the respondents and the interested parties submit that the 1st respondent is a non-existent legal entity incapable of suing or being sued. Section 5 of the *County Government Act, 2012* provides that the county government shall be responsible for any functions assigned to it under the *Constitution* or Act of parliament. In the suit before the trial court, the 2nd respondent was denied its legal mandate to appear and defend itself. The 2nd respondent was not involved in the matter before the subordinate court and it cannot be said that it failed to implement the court's decision.
4. It was further argued that the ex-parte's application is premised on the judgment in default and that the applicant failed to adhere to the provisions of Order 10 Rule 8 which requires a party to seek leave of court before seeking judgment in default against the government.
5. They argue that the chief officer Ministry of Health in the County Government of Bungoma being an interested party cannot be compelled to execute a decree as it is not a party in Bungoma CMCC No 207 of 2022. They argue that the test for mandamus is set out in the case of *Apotex Inc. v Canada (Attorney General)* and was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)* where the court considered that the following 8 factors must be present:
 - i. There must be a public legal duty to act.
 - ii. The duty must be owed to the applicants.
 - iii. There must be a clear right to the performance of that duty, meaning that:
 - a. The applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - I. A prior demand for performance
 - II. A reasonable time to comply with the demand, unless there was outright refusal; and
 - III. An express refusal, or implied refusal through unreasonable delay
 - iv. No other adequate remedy is available to the applicants.



- v. The order sought must be of some practical value or effect.
 - vi. There is no equitable bar to the relief sought.
 - vii. On a balance of convenience, mandamus should lie.
6. The respondents and interested party submit that the applicant failed to demonstrate condition III and thus its application is defective and the same should be dismissed.
7. The Ex-parte applicant opposed the preliminary objection and submitted that no points of law have been raised in the preliminary objection but rather factual matters. They further submit that non-joinder of a party cannot be the basis of preliminary objection since the main motion is yet to be heard. He relied on the case of Sir Charles Newbold at page 70 in *Mukisu Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA held that:
- “A preliminary objection in the nature of what used to be a demurrer. It raised a pure point of law in which is usually 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”
8. Similarly, in *Peter Mungai v Joseph Ngaba Kuria & Another and Leah Njeri Ndichu* (2022) eKLR:
- “20. 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.
- ...
24. With the greatest of respect, this objection calls upon this Court to inquire of the pleadings to ascertain whether or not the Interested Party was a party or not in the trial Court. Equally the Court will have to inquire into evidence to find out if she has an accrued right capable of protection by the Court.”

Analysis And Determination

9. I have considered the preliminary objection dated 19/08/2023 and the rival submissions by the parties. The issue before the court is whether the preliminary objection is premised on a pure point of law and if so, whether the same should be allowed. The court in *Jamii Bora Kenya Limited v Esther Wairimu Mbugua & another* [2019] eKLR, observed that:

“A “preliminary objection” correctly understood, is now well defined 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”



10. A Tanzanian Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & others v Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only “consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the “normal manner” when deliberating on the merits or otherwise of the concerned legal proceedings.”

11. The issue in the preliminary objection requires this court to consider whether issues of misjoinder is a matter of law. In *Maureen Onsongo v EOH Limited an EOH/Copy Cat Limited Company* [2021] eKLR the respondent filed a preliminary objection on grounds that the suit before that court was incurably defective and ought to be struck out on the grounds that the Respondent is not a proper party. The court dismissed the preliminary objection and held that misjoinder cannot be said to have rendered the suit so hopeless that it cannot be salvaged by an amendment at any time before judgment. The court observed that:

“14. The effect of misjoinder of non-joinder of parties, is provided for by Order 1 Rule 9 of the Civil Procedure Rules, 2020, which make it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides that:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

12. Similarly, the Court of appeal in *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR was called to consider a matter that was commenced before the high court but struck out by the high court after the respondents filled a preliminary on grounds that there was misjoinder of parties. The Court of Appeal considered the matter on appeal and reversed the decision of the High Court and dismissed the preliminary objection by holding that:

“We are of the considered view that the preliminary objections raised by the respondents did not raise any pure point of law. By and large the respondents dwelt on the character of the suit before the trial court in terms of the number of parties involved. Of concern to the respondents was the fact that each of the appellants had a separate and distinct claim. The respondents were of the view that the said claims were deserving of separate suits and hearings as opposed to a collective hearing. Even if for a moment, and for arguments sake, we were to take the subject of misjoinder as a pure point of law, the veracity of the respondent’s



pleadings in this regard cannot be vouched for in the absence of a trial. Most critically Order 1 Rule 9 of the *Civil Procedure Rules (2010)* makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.

...

...strictly speaking the respondent's preliminary objection did not meet the requisite threshold and should not have been allowed."

13. In conclusion, I am of the view that the preliminary objection does not raise any pure points of law and in any case, if there was a misjoinder, the same cannot be a ground to defeat the suit by the Ex-parte applicant. The preliminary objection dated 19/08/2023 is hereby dismissed. Costs shall be in cause.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER 2023.

R.E. OUGO

JUDGE

In the presence of:

Mr. Bw'Onchiri For the Applicant

Miss Walaka For the Respondents & Interested Party

Wilkister C/A

