



**Jimale & another v County Government of Wajir & 4 others (Civil Suit E001 of 2023) [2023] KEHC 27369 (KLR) (28 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL SUIT E001 OF 2023  
JN ONYIEGO, J  
DECEMBER 28, 2023**

**BETWEEN**

**ABDI MUHUMED JIMALE ..... 1<sup>ST</sup> APPLICANT**

**AHMED MUKTAR ALI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF WAJIR ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNOR OF WAJIR ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF WAJIR ..... 3<sup>RD</sup> RESPONDENT**

**CONTROLLER OF BUDGET ..... 4<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY – NATIONAL TREASURY ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The matter before this court for determination is a notice of motion dated 18.04.2023 concurrently canvassed with a notice of preliminary objection in response thereof dated 04.07.2023.
2. The said notice of motion sought orders enumerated on the face of it and supported by the affidavit of Abdi Muhumed Jimale sworn on 18<sup>th</sup> April 2023; Among the prayers sought are;
  - a. spent
  - b. That pending hearing and determination of the application herein, the 4<sup>th</sup> respondent be restrained from releasing, authorizing and or approving withdrawals of development funds from the equalization fund, county revenue funds and any other public fund.



- c. That pending hearing and determination of the suit herein, the 4<sup>th</sup> respondent be restrained from releasing, authorizing and or approving withdrawals of development funds from the equalization fund, county revenue funds and any other public fund.
  - d. That in the alternative to prayer 2 and above, pending hearing and determination of the suit, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents be ordered to deposit the contractual sum of Kshs 74,174,217 in an interest joint earning account held by the applicants' /respondents' advocates.
  - e. That pending hearing and determination of the suit, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents be ordered to deposit the contractual sum of Kshs 74,174,217 in court.
  - f. That pending hearing and determination of the application, the 1<sup>st</sup> Respondent be prevented from engaging/undertaking and or awarding development projects
  - g. That this court grants any other order it deems fit in the interest of justice.
3. It is the applicants' case that on or about 18<sup>th</sup> December, 2021, upon deliberations with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents among other representatives of the county government, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents verified their (applicants') pending bills as genuine and entered into an agreement for payment of the same on priority basis with the plaintiffs(applicants)- as representatives and beneficiaries of the said companies.
  4. That upon writing demand letters, the County Government of Wajir, in the presence of their advocates executed an agreement to settle the amount and pay them in three equal tranches. It was averred that a similar agreement with the previous governor regarding the payment of their claim to be paid as a single claim and enforceable against the county had been executed.
  5. He deposed that the said agreement was as a result of consensus and an undertaking by the 1<sup>st</sup> defendant/respondent that the agreed payments had been budgeted for. It was further stated that in the absence of declaratory orders by this court, the respondents would still continue with their illegal actions as auctioneers are after his properties to settle his financial obligations. He beseeched this Honourable Court to grant the orders sought herein.
  6. In response to the application, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a preliminary objection dated 04.07.2023, seeking that:
    - i. The plaintiffs lack locus standi to institute proceedings on behalf of/for the benefit of juristic persons and the incorporated companies whose interest the plaintiffs assert.
    - ii. On account of corporate personality, the companies in whose favour/for whose benefit the plaintiffs bring these proceedings are the proper plaintiffs for any actions in their favour.
  7. It was urged that the proceedings be terminated by striking out the plaint and the application plus documents filed in support thereof with costs to the defendants.
  8. In response, Mr. Hillow Issack Mumin, the county secretary on behalf of the 1<sup>st</sup> respondent swore a replying affidavit filed by the firm of Nchogu, Omwanza & Nyasimi. It was deposed that the principles of public finance as spelt out in article 201 of the Constitution enjoin the county government to be open and accountable in financial matters, prudent and responsible in using public money. That the county government like any other public entity procures for goods and services using the framework embedded in the PPDA and Regulations thereunder. That upon successful award of tenders, the county government enters into contracts with its suppliers/contractors which contracts form the basis of their engagements.



9. He reiterated that he was aware that companies are separate entities from their directors/beneficiaries and therefore, any dispute as to either party's contractual obligations, only the parties can institute civil action. He deposed that the applicants/plaintiffs herein lack the locus standi to institute the present proceedings in favour of suppliers/contractors as they are not privy to the arrangements between the county and the companies who were/are alleged to be suppliers/contractors.
10. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed joint grounds of opposition dated 04.07.2023 wherein it was stated that the notice of motion herein is bad in law as the plaintiffs/applicants lack the legal standing to originate the claim. That the motion is contra articles 201 and 227 of the Constitution, the Public Procurement and Asset Disposal Act and sections 102,148,149,153 of the Public Finance and Management Act. Additionally, that the application was against the rule set out in Salomon v Salomon & Co. Ltd [1896] UKHL 1.
11. It was urged that the suit is founded on an illegal act/agreement and therefore no action could arise therefrom. It was further stated that the applicants have no cognizable cause of action worthy of ventilation before this Honourable Court thus relying inter alia on the case of Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others [2004] eKLR. Finally, this court was urged to dismiss the motion and the suit herein as the same amounts to abuse of the court process.
12. The applicants, represented by the firm of Duwane Gisore & Wethow Advocates filed submissions on 31<sup>st</sup> July 2023. Learned counsel submitted in regards to three issues for determination stipulated as follows; whether the plaintiff/s/applicants herein have locus to institute the present suit; whether the plaintiffs /applicants have fulfilled the conditions for grant of restraining orders and costs of the application.
13. On the first issue, it was submitted that the County Government of Wajir entered into an agreement with Ibrahim Adan Hassan, Abdi Mohamud Jimale, Ismail Hulbame Mohamed as beneficiaries of the companies owed funds by the county government of Wajir. That the applicants sought for enforcement of contracts hence have locus as parties to the signed contract. The applicants relied on the case of Philmark Systems Co. Ltd v Andermore enterprises [2018] eKLR and further section 35 of the Companies Act on the proposition that an agreement made by a representative of the appellant was binding on the appellant in that case. It was their case that this Honourable Court has immense jurisdictional remit as provided for under article 165 (3) and 239(1) of the Constitution to address violation, infringement and/or a threat to a right or fundamental freedom.
14. On the second issue, it was urged that the applicants qualify to be granted the injunctive order sought against the respondents as a *prima facie* case had been established considering that the 1<sup>st</sup> respondent had contracted various companies between 2018 and 2022 for delivery of goods and services which was not done. It was contended that the 2<sup>nd</sup> respondent acted in breach of the contract by not fulfilling their part of the bargain and as such, they still owe the applicants the amount in question.
15. In support of their submissions on grant of injunction, reliance was placed on the case of Giella v Cassman Brown and Company Limited (1973) EA 385 to buttress the position that the applicants have established a *prima facie* case with a probability of success; that the applicants stand to suffer loss that cannot be compensated by damages and that the balance of convenience tilts in the favour of the applicants
16. Counsel further relied on the holding in the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company & 2 others [2016] eKLR to express the point that before a court decides on an injunction application, it ought to consider as to which party will suffer the greater harm with the outcome of the motion. That if the applicant has a strong case on the merits or there is significant irreparable harm,



it may influence the balance in favour of granting an injunction. Counsel urged the court to maintain the status quo in determining where the balance on convenience lies.

17. Having considered the application herein, the preliminary objection thereof, written submissions and the authorities supplied by the parties, the only issue which germinates for determination is; whether the Preliminary Objection raises a pure point of law to warrant striking out of the application as well as the suit.
18. As to whether the Preliminary Objection as raised is a pure point of law, guidance can be drawn from the case of *Mukbisa Biscuit Manufacturing Co. Ltd. v West End Distributors Limited* EA 696, where the court defined a preliminary objection as follows;

“...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...”

19. The effect of the case law cited above clearly stipulates that for one to succeed in putting up a Preliminary Objection, he or she must meet the following criteria; the preliminary objection must be pleaded by one party and admitted by the other; It must be a matter of law which is capable of disposing off the suit with finality; it must not be blurred by factual details calling for evidence and; it must not call upon the Court to exercise discretion.
20. In the instant case, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants urged that the plaintiffs lack locus standii to institute proceedings on behalf of/for the benefit of juristic persons and the incorporated companies whose interest the plaintiffs assert. That on account of corporate personality, the companies in whose favour/for whose benefit the plaintiffs bring these proceedings are the proper plaintiffs for any actions in their favour.
21. It is trite that a company is a legal person. The law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In *Salomon v Salomon & Co* (*supra*) Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words:

“The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.”

22. It was submitted that on or about December 2021, upon deliberations with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents amongst other representatives of the county, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents verified their pending bills as genuine bills and entered into an agreement for payment of the same on priority basis with the plaintiffs- as representatives and beneficiaries of the said companies- which agreement is dated 18.12.2021.



23. It is interesting that the entities which offered the alleged services to the 1<sup>st</sup> respondent are listed in the annexure, appendix one and all of them are listed as limited companies. What I can discern from the agreement is that the applicants are interested parties but not principal parties as they were not parties to the contracts between the alleged companies and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
24. However, a right having been created by the payment agreement subject to proof of its legality, the contracting companies ought to have instituted their respective suits/ suit as principal parties with the applicants as interested parties. The agreement would only be used as proof of the existence of an enforceable contract between the suppliers of goods and the 1<sup>st</sup> respondent.
25. This court has independently perused the said agreement for payment pending bills on priority basis – signed on 08.12.2021 - between the applicants/plaintiffs and the 1<sup>st</sup> respondent/defendant. Of importance to note is the fact that the applicants/defendants herein are noted as beneficiaries of companies stated in appendix one. It is not clear how the applicants/defendants supposedly benefit or would benefit from the monies realized in the impugned agreement for payment. It is not clear whether they are the managers, directors or even shareholders of the companies listed under index 1. The Court of Appeal in the case of Stephen Njoroge Gikera & another v Econite Mining Company Limited & 7 others [2018] eKLR recited the decision in Jones v Lipman & another [1962] 1 All ER 442) and H. L. Bolton (Engineering Co. Ltd v T. J. Graham & Sons Ltd [1956] 3 ALL ER where it was held;
- “ A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such”
26. It could not therefore be said as was maintained by the applicants/plaintiffs that they were beneficiaries on behalf of the companies listed in appendix 1 and therefore, whatever actions they took, they could bind the respondents. They are different legal entities from the companies that were owed money by the 1<sup>st</sup> respondent hence mere interested parties who can only come on board through the said companies as principal parties.
27. In the premises therefore, and taking into account that the applicants cannot institute the suit as principal parties while the companies which are legal entities who rendered services and supplied goods to the 1<sup>st</sup> respondent are there, the suit is rendered incompetent for lack of *locus standi* hence the preliminary objection is found to be meritorious and as such, the application and the suit herein are struck out with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF DECEMBER 2023**

**J.N.ONYIEGO**

**JUDGE**

