



Otieno v Nyanuaya (Chairman Kisumu Centre Juakali Artisans Association) & 2 others; Registrar of Societies (Interested Party) (Civil Case E017 of 2023) [2023] KEHC 26839 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E017 OF 2023
RE ABURILI, J
DECEMBER 19, 2023**

BETWEEN

FRANCIS OUMA OTIENO APPLICANT

AND

JACOB NYANUAYAA (CHAIRMAN KISUMU CENTRE JUAkali ARTISANS ASSOCIATION) 1ST RESPONDENT

DAVID ODANGA (SECRETARY KISUMU CENTRE JUAkali ARTISANS ASSOCIATION) 2ND RESPONDENT

EVERLYNE EGESA (TREASURER KISUMU CENTRE JUAkali ARTISANS ASSOCIATION) 3RD RESPONDENT

AND

THE REGISTRAR OF SOCIETIES INTERESTED PARTY

RULING

1. This matter was filed under certificate of urgency with an application dated 15th December 2023 seeking to injunct the Defendants from conducting elections for Kisumu Centre Juakali Artisans Association scheduled for 20th December 2023.
2. The court did not certify the application as urgent but it nonetheless directed the Plaintiff/Applicant to serve the Defendants/Respondents to appear on 18th December 2023 for interpartes directions.
3. When the parties appeared on 18th December 2023, the Respondents had filed a Preliminary Objection to the application and whole suit seeking to have the two struck out in limine on the grounds that the Plaintiff/Applicant is nonsuited because he is not a fully paid up member of the Association and secondly, that he had only sued the officials of the Association and not the Association.



4. Both counsel agreed to argue and have the preliminary objection disposed off expeditiously and the court allowed them to argue on the same orally.
5. The respondents' counsel argued that as the applicant was not a fully paid up member of the Association, he could not bring suit to stop the elections scheduled for 20th December, 2023. Further, that the respondents were sued as officials of the Association without joining the Association to the proceedings as a party and that in as much as nonjoinder and misjoinder of a party is not fatal to a case, in this case, the failure to join the association as a party was fatal.
6. In response, counsel for the applicant submitted that the question of whether or not the applicant was a fully paid up member of the Association was a factual issue which require evidence and a list of all members who are fully paid up to be produced hence it is not a pure point of law to be determined on a preliminary point. Further, that the respondents were sued in their capacities as officials of the Association and therefore the objection raised is misconceived hence the same should be dismissed.
7. I have considered the preliminary objection on both limbs as filed and argued and the issue I must determine is whether the objections meet the threshold for a preliminary objection as was stated in the case of *Mukisa Biscuits Co. Ltd v West End Distributors Ltd*. [1996] EA 696 case.
8. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....”
9. The above legal preposition has been made clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes pure points of law. The Learned Judge then held that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
10. In *Attorney General & Another v Andrew Mwaura Githinji & another* [2016] eKLR, the court was explicit on the scope, nature and meaning of a Preliminary Objection in the following terms:
 - (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.”
11. The Supreme Court of Kenya in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* [2014] eKLR held that a preliminary objection consists of a point of law which has been pleaded or



which arises by clear implication out of the pleadings and which if argued as a preliminary point, may dispose of the suit.

12. In *David Nyekorach Matsanga & Another v Philip Waki & 3 Others* [2017] eKLR it was held that a preliminary objection should not be raised where facts had to be ascertained or where what was sought is the exercise of judicial discretion.
13. In *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, it was held that it was improper to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on merits instead of summarily and that judicial time and resources would be preserved for hearing a matter on merits.
14. In the instant case, it is alleged that the applicant is not a fully paid up member of the Association hence he cannot be properly suited to sue and obtain orders from the court against the Association and its officials. The applicant contends that the issue of membership to the Society cannot be resolved on a preliminary point as it is a matter of fact and evidence required. Secondly, the respondents contended that the applicant only sued the officials of the Association and not the Association itself which was fatal to the case.
15. In *Oraro v Mbaja* [2005] 1KLR 141, the Court held that:

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
16. In the instant case, the question of whether the applicant is a fully paid up member is a question of evidence to be adduced and at this stage, no such evidence is available to determine whether he is well suited to bring this suit as a member of the association, considering that the applicant has complained that the respondents have failed to provide an updated register of the Association’s members and no such register has been availed to this court. I therefore find that the first limb of the preliminary objection is devoid of any merit and is declined.
17. On the second limb of the preliminary objection, that the Association was not joined as a party, the respondent’s counsel conceded in his submissions that misjoinder and non-joinder of parties is not fatal to the case. The applicant’s counsel maintained that the respondents had been properly sued as officials of the association and that therefore there was no defect in the suit.
18. In *Republic v National Environment Management Authority; Water Service Providers Association (WASPA) (Intended Interested Party/Applicant) Ex parte Nairobi City Water and Sewerage Company & another* [2021] eKLR Nyamweya J (as she then was in the High Court) stated as follows on the question of non-joinder and misjoinder of parties, citing other decisions from the Court of Appeal:

“The grounds raised cannot therefore be raised in a preliminary objection as they are not pure questions of law. In addition, the legal nature of a plea of misjoinder or non-joinder was addressed by the Court of Appeal in *Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers v Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another* Civil Appeal (Application) No. Nai. 281 of 2005 as follows:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney



General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court.”

22. This was also the position adopted in *Consolata Kibara & 21 Others v The Director of Kenya Trypanosomiasis Research Institute Nairobi* [2003] KLR 582, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. In this respect, misjoinder or non-joinder cannot therefore be the basis for a preliminary objection upon which an otherwise competent application is to be dismissed, as this Court has the discretion to address this irregularity in its findings and orders. [emphasis added].
23. To this extent, the issue of whether there has been a misjoinder of the Respondent cannot therefore be raised as a preliminary point of law. The Respondent’s Preliminary Objection is accordingly found to be without merit.”
19. The issue of misjoinder or non-joinder, as correctly stated in the above decisions is one that cannot be raised in a preliminary objection as such failure can be cured by an amendment to the pleadings.
20. Order 1 Rules 9 and 10 of the *Civil Procedure Rules*, 2010 are clear that:

“Misjoinder and non-joinder [Order 1, rule 9.]

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.

 10. Substitution and addition of parties [Order 1, rule 10.]
 - (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
 - (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
 - (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”
21. From the cited pleadings, the applicant has sued the respondents in their capacity as officials of the Association which is also named. An association which is unincorporated has no capacity to sue and



be sued in its own name but it can sue and be sued in the name of its registered officials. That is what the applicant has done. If there be any defect in that description, it can be cured by an amendment and not striking out of pleadings. I find the issue raised does not meet the test of a preliminary objection as defined above. I decline to uphold the preliminary objection and dismiss it.

22. I make no orders as to costs at this stage.

23. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2023

R. E. ABURILI

JUDGE

