



Brownfield Developers Limited v Nyara Youth Group (Suing through its Chairman, Secretary and Treasurer) (Environment & Land Case 6 of 2022) [2025] KEELC 250 (KLR) (28 January 2025) (Ruling)

Neutral citation: [2025] KEELC 250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 6 OF 2022
JO MBOYA, J
JANUARY 28, 2025**

BETWEEN

BROWNFIELD DEVELOPERS LIMITED PLAINTIFF

AND

NYARA YOUTH GROUP (SUING THROUGH ITS CHAIRMAN, SECRETARY AND TREASURER) DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Respondent approached the court vide Plaint dated the 3rd August 2022 and in respect of which the Plaintiff/Respondent [hereinafter referred to as the Respondent] sought for the following reliefs;
 - i. A declaration that the Plaintiff is the Legal owner and proprietor of the suit property and is entitled to exclusive and unimpeded right of possession and occupation of the suit Property-Isiolo Township Block 5/13.
 - ii. A declaration that the Defendants, whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit Property-Isiolo Township Block 5/13-and are accordingly, trespassers on the same.
 - iii. An injunction restraining the defendants, their servants, workmen and agents. from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the plaintiff's use and enjoyment of the plaintiff's said property-Isiolo Township Block 5/13.



- iv. A permanent injunction restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit Property- Isiolo Township Block 5/13.
 - v. An order of Eviction from the said premises
 - vi. General Damages for trespass.
 - vii. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit and just to grant
 - viii. Any other relief the court deems fit to grant.
2. Upon being served with the Plaintiff and summons to enter appearance and the application dated the 3rd August 2022; the Defendant duly entered appearance and filed a statement of defence dated the 29th September 2022. Additionally, the Defendant herein also filed a counterclaim vide originating summons dated the 29th September 2022; and wherein the Defendant sought to be declared as the owner of the suit property on the basis of adverse possession.
 3. Moreover, the Defendant also filed a Notice of preliminary objection dated the 5th February 2024; and wherein the Defendant has raised the following grounds;
 - i. The suit as filed is incompetent, bad in law and an abuse of the due process of the court.
 - ii. The parties sued as the Defendant is not a legal person known in law and capable of suing and/or being sued.
 4. The Plaintiff herein thereafter proceeded to and filed an application dated the 20th February 2024; and wherein the Plaintiff sought for leave to amend the Plaintiff in accordance with [sic] the draft amended Plaintiff.
 5. Suffice it to state that the Notice of preliminary objection and the application dated the 20th February 2024 came up for directions on the 20th May 2024 and whereupon the court [Hon Justice P M Njoroge, Judge now retired] ordered and directed that the application and the preliminary objection be canvassed by way of written submissions.
 6. Arising from the directions of the court [details in terms of the preceding paragraphs], the Defendant filed written submissions dated the 14th February 2024 whereas the Plaintiff filed written submissions dated the 19th June 2024. Both sets of written submissions are on record.

Parties Submissions:

a. Defendant's Submissions:

7. The Defendant filed written submissions dated the 14th February 2024; and wherein the Defendant adopted and reiterated the grounds at the foot of the Notice of preliminary objection dated the 5th February 2024.
8. Moreover, learned counsel for the Defendant has submitted that the Defendant herein is not a body corporate and or legal entity capable of suing or being sued in its own name. In particular, it has been contended that by virtue of being a youth group registered under the Ministry, the Defendant can only be sued through the registered officials thereof and not otherwise.



9. Furthermore, it has been submitted that by virtue of being an association and/or society, any suit as against the Defendant must be commenced as against the registered officials, whose names must be duly captured and reflected in the body of the pleadings.
10. To the extent that the suit herein has been filed against the Defendant, which is not a legal entity, it has been contended that the entire suit is therefore premature, misconceived and thus constitute[s] an abuse of the due process of the court. In this regard, learned counsel for the Defendant has invited the court to find and hold that the Plaintiff herein is non-suited.
11. In support of the foregoing submissions, learned counsel for the Defendant has cited and referenced various decisions including *Kipsiwo Community Self-help Group v The Attorney General & 6 Others* [2013]eKLR and *Hathing Self-help Group v Cooperative Bank Ltd & Another* [2021]eKLR, respectively.

b. Plaintiff's Submissions:

12. The Plaintiff filed written submissions dated the 19th June 2024; and wherein the Plaintiff has canvassed and highlighted three [3] salient issues for consideration by the court. Firstly, learned counsel for the Plaintiff has submitted that upon being served with the preliminary objection, the Plaintiff filed the application dated the 20th February 2024 and wherein the Plaintiff seeks to procure leave of the court to amend the Plaintiff.
13. Owing to the fact that the Plaintiff has filed an application for leave to amend the Plaintiff and to remedy the defect adverted to at the foot of the preliminary objection, it has been contended that it behoves the court to hear and determine the application for amendment in the first instance.
14. Moreover, learned counsel for the Plaintiff has submitted that where a court of law is faced with two [2] sets of applications which are contradictory and mutually inconsistent, it behoves the court to prioritise and deal with the application which seeks to breath life into the suit first and thereafter to deal with the application which seeks to bring the proceedings to an end. To this end, learned counsel for the Plaintiff has implored the court to find it just, expedient and mete to prioritise the application for leave to amend and not the preliminary objection.
15. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and referenced various decisions including *Mavuno Industries Ltd & 2 Others v Keroche Industries Ltd* [2012]eKLR and *DT Dobbie & Co Ltd v Joseph Mbaria Muchina & Another* [1980]eKLR.
16. Secondly, learned counsel for the Plaintiff has submitted that striking out of a suit is a drastic and draconian order and thus the court should exercise caution and circumspection before advertent to any application for striking out of a suit. In any event, it has been contended that the striking out and/or summary procedure should only be deployed where the case beforehand is hopelessly and irredeemably bad in law.
17. Moreover, it has been submitted that where a suit is capable of redemption by way of amendment, then a court of law should be reluctant to resort to and deploy striking out. For good measure, it has been submitted that the defect and/or deficiency complained of in respect of the instant matter, is one that can be redeemed vide amendment.
18. Thirdly, it has been submitted that following the amendment of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; and in particular the introductions of Sections 1A and 1B of the *Civil procedure Act*, the court is clothed with wide and unfettered powers that suits/proceedings are heard and determined on merits as opposed to reliance on technicality.



19. To buttress the foregoing submissions, learned counsel for the Plaintiff has cited and referenced the holding in the case of *Stephene Mboro Gitiha v Family Finance Building Society & 3 Others* [2009]eKLR and *Kenya Commercial Finance Company Ltd v Akwesera Odit* [2010]eKLR, respectively.
20. Premised on the foregoing submissions, learned counsel for the Plaintiff has implored the court to find and hold that the preliminary objection by the Defendant is not tenable and thus same ought to be dismissed. Moreover, learned counsel for the Plaintiff has also contended that it should be apposite for the court to consider the application for amendment beforehand.

Issues for Determination:

21. Having reviewed the Notice of preliminary objection dated the 5th February 2024; and upon taking into consideration the written submissions filed on behalf of the respective, the following issues emerge [emerge] and are worthy of determination;
 - i. Whether the Application to amend which has been filed on the face of the Notice of preliminary objection ought to be prioritized or otherwise.
 - ii. Whether the suit as against the Defendant is void and invalid or otherwise.
 - iii. Whether the deficiency which underpins the preliminary objection can be remedied vide amendment or otherwise.

Analysis and Determination

Issue Number 1

Whether the Application to amend which has been filed on the face of the notice of preliminary objection ought to be prioritized or otherwise.

22. Suffice it to state that upon being served with the Notice of preliminary objection dated the 5th February 2024 and which essentially sought to have the suit struck out for being invalid and a non-starter, the Plaintiff responded by filing an application dated the 20th February 2024, seeking leave to amend the Plaint.
23. Arising from the foregoing, it suffices to underscore that there is a notice of preliminary objection seeking to have the suit struck out on one hand; and an application seeking leave to amend. In this regard, a debate does arise as to which of the two processes ought to be dealt with and disposed of beforehand.
24. According to learned counsel for the Plaintiff, where a court of law is confronted with two processes which are contradictory and mutually inconsistent, it is incumbent upon the court to prioritise the process to sustain the life of the suit and not otherwise. In this regard, learned counsel for the Plaintiff has therefore posited that the court should prioritize the hearing of the application and not the preliminary objection.
25. Pertinently, the submissions by and on behalf of the Plaintiff are underpinned by the decision in the case of *Mavuno Industries Ltd & 2 Others v Keroche Industries Ltd* [2012]eKLR where the learned judge [G.VOdunga, Judge, as he then was] stated thus;

“....The court, when faced with such contradictory and mutually inconsistency applications may well be advised to deal with the application seeking to breath life into the suit and



thereafter deal with the one for bringing the proceedings to an end. This position is inconsonance with a long line of decisions that pleadings should only be struck out when they are so hopeless that life cannot be breathed into them by way of amendment”.

26. Despite the holding of the court which has been highlighted in the preceding paragraph, it is important to underscore that the Supreme Court of Kenya has had an occasion to consider a similar scenario. In particular, the Supreme court had occasion to address a situation where an application for leave to amend was filed on the face of a preliminary objection and the Supreme court [the apex court] held that the application for amendment cannot be prioritized in an endeavour to defeat a preliminary objection which has been filed and subsist[s] on record.

27. The foregoing exposition of the law was adverted to in the case of *Abidha Nicholas v National Environment Management Authority & Others* [2023] KESC, where the court stated and held as hereunder;

112. With utmost respect, the Court of Appeal was misguided in arriving at this finding. Misguided was the court because, a party cannot move to amend pleadings once a preliminary objection has been raised as relates to pleadings filed to confer jurisdiction. Preliminary objections are raised because, upon determination, the outcome would have a major bearing on the status of a claim, as the preliminary objection raises a pure point of law which if successful, would dispose of the petition as it did in the instant case. To restate the relevant principle in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696:

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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."

113. The appellant presented his grievances as constitutional questions believing that his fundamental rights under *the Constitution* had been violated. The trial court proceeded to strike out his petition preliminarily for lack of jurisdiction. He chose to appeal the decision, as opposed to amending his pleadings or filing another suit. There was nothing wrong in that act and the pursuit of an appeal is the choice of a litigant as is the choice to withdraw a pleading and filing a fresh one. Indeed, courts generally take a dim view of a party acting upon a preliminary objection by taking the path of avoiding such an objection instead of facing it and letting the court determine it on the merits. This finding is also pertinent to the issue below.

28. Flowing from the dictum in the decision [supra], it is apparent and evident that a party, in this case the plaintiff, cannot be allowed to propagate an application for leave to amend the pleadings which are the subject of challenge vide a preliminary objection. Instructively, if the court were to prioritize the application for leave to amend, then essentially it means that the notice of preliminary objection shall stand negated and/or defeated.

29. Moreover, the hearing and determination of the application for leave to amend, which has been filed on the face of the preliminary objection and I dare say, which is intended to defeat the preliminary



objection, shall be tantamount to driving away the Defendant from the seat of justice prior to and before being heard on the preliminary objection.

30. Other than the foregoing, there is no gainsaying that by virtue of raising the preliminary objection in question, the Defendant herein has accrued a legitimate expectation which expectation ought not to be taken away by the court lightly, by acceding to the hearing and determination of an application for leave to amend filed ex-post-facto.
31. Finally, it is also not lost on the court that where court processes are filed, it behoves the court to prioritize the hearing and determination of the first process [filing]; in this case the notice of preliminary objection, unless there exists an exceptional and compelling reason to do otherwise.
32. Suffice it to posit, that equity prioritises first in time.
33. Based on the foregoing, and coupled with the succinct position adverted to by the Supreme Court in the Abidha Nicholus case [supra], I find and hold that the contention by the Plaintiff is not merited. In this regard, I am not persuaded to prioritize the application dated the 20th February 2024, which no doubt is intended to circumvent and defeat the preliminary objection which is on record.

Issue Number 2

Whether the suit as against the Defendant is void and invalid or otherwise.

34. Other than the discussion which has been adverted to and highlighted in the preceding paragraphs, there is also the debate as to whether a suit filed against a body which is not a legal entity, is void or voidable. To this end, it is apposite to state that the Defendant herein is an association registered under the ministry and thus same is not a body corporate or legal entity in the eyes of the law.
35. To the extent that the Defendant is not a legal entity, it is imperative to state and underscore that any suit or legal proceedings against the Defendant herein, can only be mounted by and/or against the registered officials of the association and not otherwise.
36. Moreover, the law requires that the names of the registered officials be highlighted and alluded to in the title of the suit. For good measure, it is the officials who are mandated to sue and/or be sued on behalf of the association; and not the office[s] of the Association.
37. I beg to state and underscore that in filing a suit by and on behalf of an association, the Defendant not excepted, one is not at liberty to implead the offices, namely, Chairman, Secretary and Treasurer of the association. Instructively, the offices are not legal entities and hence same cannot be impleaded.
38. Barring repetition, the persons who ought to be sued are the holders of the offices, for and on behalf of the society. In this regard, if the Plaintiff was keen to implead and or commence proceedings against the Defendant, then it behoved the Plaintiff to authenticate and ascertain the names of the registered officials and thereafter implead the said names for and on behalf of the association.
39. To buttress the foregoing exposition of the law, it suffices to reference the holding in the case of Geoffrey Ndirangu versus Chairman Mariakani Jua Kali Association & 2 Others (2005) eKLR, where the court held as hereunder;

The law on suits by or against societies is well settled. A society not being a legal person cannot sue or be sued in its name. It has to sue or be sued through its officials – Voi Jua Kali Association –vs- Sange and others (2002) 2 KLR 474. And the officials have to be named.



Titles like Chairman, Secretary and or treasurer cannot be used as those are not legal persons either.’

40. Moreover, the same issue was adverted to and elaborated upon in the case of *Ngati & 3 others v Mutie & 7 others* (Environment and Land Case Civil Suit 63 of 2018) [2023] KEELC 17878 (KLR) (18 May 2023) (Judgment), where the court observed as hereunder;

100. Recently, this court in the case of *The Executive Committee of Ngei Estate Phase II versus Eric Mureith Waweru Milimani* ELC No. E013 of 2020 (unreported), stated and held as hereunder;

To my mind, a Society and/or an Association, is devoid of the requisite legal personality, which inheres In incorporated bodies, for Example, Companies, Co-operative societies and Political Parties, the latter which is registered under the *Political Parties Act*, 2011.

Whereas duly incorporated bodies, are vested with legal capacity and/or personality to sue and/or be sued in their own names, the converse obtains in respect of Unincorporated bodies, inter-alia, Societies registered under the *Societies Act*, Chapter 108 Laws of Kenya.

At any rate, it is common ground and worthy of repetition that a society or un association, which is not a body corporate, can only sue through her Registered Trustees or Officials, but not in her own name.

On the other hand, it is also worth mentioning that where the Society or Association is suing in the names of her officials, it is imperative that the names of the Officials as opposed to the Titles be used. For clarity, no legal suit can be filed under the guise of chairman, secretary and treasurer of some society/association.

Notwithstanding the foregoing, it also bears repetition that there is no legal capacity that inheres in a body known as the Executive committee, in the manner that has been used by the Plaintiff/Respondent herein. For the avoidance of doubt, the said purported Executive committee, comprises of known persons whose names ought to have been used, subject to the impugned organization being registered in accordance with the law.”

41. Having filed the suit beforehand against the Defendant allegedly through the Chairman, Secretary and Treasurer, albeit without impleading the names of the officials, the question that does arise is whether the suit beforehand is void or voidable.

42. Put differently, the question that the court must grapple with is whether the entire proceedings beforehand are invalid or whether the defects/deficiencies highlighted at the foot of the Preliminary objection is one that can be remedied vide amendment.

43. In my humble albeit considered view, the issues as to whether or not the party sued is a legal entity or otherwise, is a fundamental question which goes to the root of the jurisdiction of the court. In this regard, it suffices to underscore that where a suit is filed and/or commenced against a non-existent body, then the suit is void ab initio and thus irredeemable.

44. The Court of Appeal in the case of *Euro Bank in liquidation through the Deposit Protection Fund Board v Rosaline Njeri Macharia* [2016]eKLR dealt with a similar situation.

45. For coherence, the court stated and held as hereunder;



(29) Clearly, a suit not by or against a person or a body corporate is incompetent. It is a nullity. That answers the first question. If more authority was required, the philosophy in the sagacious words of Madan, JA as he then was in *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another, (Civil Appeal No. 37 of 1978)* that “a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...”, show that only there is a suit, however poorly drafted, is amendment possible to save it. Where, as here, the suit is a nullity, there is no litigation in being in law and the issue of amendment does not arise.

Madan, JA as he then was alluded to litigation which is akin to a patient who can be treated and healed. Here, the patient is in the morgue. He is dead.

(30) In D.T. Dobie’s case (supra), there was a suit in being and the issue was whether to strike it out or not. Not so in the instant case which can be distinguished on the ground that in the instant appeal, there was no suit before trial judge. In light of this, the learned judge was correct in striking out the plaint as it had no plaintiff known to law, the Deposit Protection Fund not being a body corporate.

46. Arising from the foregoing decision, there is no gainsaying that a suit filed/commenced against a non-existent body and/or person is void [dead] in the eyes of the law. Such a suit, is irredeemable and incapable of resuscitation.

Issue Number 3

Whether the deficiency which underpins the preliminary objection can be remedied vide amendment or otherwise.

47. Having found and held that a suit against a non-existent legal entity is void and thus invalid, the next question that comes to the fore and which merits a short discussion, is whether what is void can be redeemed by amendment.

48. In an endeavour to discern whether what is void can be redeemed, it is imperative to recall the dictum in the case of *Mcfoy versus United Africa Ltd (1952) ALL ER*, where the Privy Council [per Lord Denning MR] stated and held thus;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

49. Suffice it to posit that no amount of amendment can breathe life into a void suit. For good measure, the suit beforehand was invalid ab initio [dead before arrival] and same cannot be remedied even on the basis of the application dated the 20th February 2024, which essentially seeks leave to amend the Plaint.

Final Disposition:

50. Flowing from the analysis [details enumerated in the body of the ruling], it must have become crystal clear that the preliminary objection dated the 5th February 2024; is meritorious. In this regard, the court is persuaded that the suit beforehand is hopelessly and irredeemably bad.

51. In the circumstances, the final orders that commend themselves to the court are as hereunder;

i. The Preliminary Objection dated the 5th February 2024 be and is hereby allowed.



- ii. The Plaintiff's suit vide Plaint dated the 3rd August 2022; be and is hereby struck out.
- iii. Cost of the preliminary objection and the suit be and are hereby awarded to the Defendant.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF JANUARY 2025.

OGUTTU MBOYA

JUDGE.

In the presence of:

Mutuma – Court Assistant.

Ms. Nkatha h/b for Mr. Gachoka for the Plaintiff.

Mr. Mokuia for the Defendant.

