



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 5 OF 2017

MASHA CHENGO NGOWA.....PETITIONER/RESPONDENT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT/APPLICANT

THE ATTORNEY GENERAL.....2ND RESPONDENT/APPLICANT

AND

OKOMBOLI ONG'ONG'A.....INTENDED INTERESTED PARTY

RULING

[1ST RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION

DATED 17TH MARCH, 2017]

1. The Respondent, the Director of Public Prosecutions (DPP) through the notice of preliminary objection dated 17th March, 2017 seeks to have the petition of Masha Chengo Ngowa struck out for not raising any point of law or constitutional issues to warrant issuance of the orders sought. Further, that the petition is an abuse of the court process, mischievous, without merit, vexatious, frivolous and is thus improperly before court and seeks to curtail the mandate of the Police Service. The 2nd Respondent, the Attorney General supports the objection.

2. The Petitioner, Masha Chengo Ngowa opposed the notice of preliminary objection.

3. When the matter came up for hearing on 14th May, 2018 counsel for the Petitioner did not attend court. Counsel for the 2nd Respondent indicated that the 1st Respondent would be relying on the submissions of the 2nd Respondent in support of the Preliminary Objection.

4. A perusal of the 2nd Respondent's submissions dated 11th December, 2015 clearly shows that the same were drafted in support of the 2nd Respondent's grounds of opposition to the petition. In the circumstances it is clear that no submissions have been filed in support of the notice of preliminary objection. Nevertheless, I am duty-bound to consider the merits of the notice of preliminary objection.

5. In opposing the notice of preliminary objection, the Petitioner through the submissions dated 23rd April, 2018 asserts that the determination of the same will not result in the disposal of the entire petition. According to the Petitioner, the preliminary objection raises factual issues which can only be determined once the evidence has been heard. The decisions in **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696**, **Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 30 others [2015] eKLR** and **Oraro v Mbaja [2005] 1 KLR 141** are relied on in support of the Petitioner's assertion that a preliminary objection consists of a point of law which has been pleaded or arises by clear implication of the pleadings and which if argued as a preliminary point may dispose of the suit.

6. The question to be answered in this ruling is whether the preliminary objection put forward by the 1st Respondent should succeed.

7. In **Aviation & Allied Workers Union Kenya** (supra), the Supreme Court defined a preliminary objection as follows:

“[15] Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.”

8. In **Mukisa Biscuit** (supra), a preliminary objection was defined as a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of the entire suit. In essence a preliminary objection is meant to arrest a suit and save the court’s precious time by terminating the same at the preliminary states. Since this is a tool that goes against the right to a hearing, the same must raise a pure point of law. Where there is a dispute about the facts of a case, a preliminary objection cannot be sustained.

9. Without the benefit of submissions, I do not understand why the 1st Respondent claims that the petition does not raise any point of law or constitutional issue. I cannot at this stage tell if the petition is vexatious, frivolous, mischievous, without merit or abuses the court process. It is only at the conclusion of the hearing that the points taken up by the 1st Respondent, through the notice of preliminary, objection can be addressed.

10. I thus conclude that the 1st Respondent’s preliminary objection is without merit. The same is dismissed. Costs shall abide the outcome of the petition.

Dated, signed and delivered at Malindi this 26th day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT