



**Kiriwa & another (On their own behalf and on behalf of 13 others) v Misoi & 5 others; Okoko & 16 others (Applicant) (Environment & Land Case 104 of 2010) [2022] KEELC 13406 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 104 OF 2010  
FO NYAGAKA, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**EZEKIEL KIRIWA ..... 1<sup>ST</sup> PLAINTIFF  
MZEE ARAP KITUR ..... 2<sup>ND</sup> PLAINTIFF  
ON THEIR OWN BEHALF AND ON BEHALF OF 13 OTHERS**

**AND**

**MICHAEL KIPRUTO MISOI ..... 1<sup>ST</sup> DEFENDANT  
NOAH KIPSANG ..... 2<sup>ND</sup> DEFENDANT  
JONATHAN SERONEI ..... 3<sup>RD</sup> DEFENDANT  
JOSEA KAPTICH KIRWA ..... 4<sup>TH</sup> DEFENDANT  
JOSEPH CHERUIYOT KUTUNY ..... 5<sup>TH</sup> DEFENDANT  
NOAH K BARNG'ETUNY ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**JEREMIAH TUTI OKOKO & 16 OTHERS ..... APPLICANT**

**RULING**

1. The applicants herein who are the plaintiffs in the suit raised a preliminary objection dated June 3, 2022 and filed on June 7, 2022. The objection was in relation to the notice of motion dated May 11, 2022 which was filed by one Jeremiah Tuti Kioko on his own behalf and on that of 16 other persons. It is important first to understand the basis of the said application and the prayers sought in it.



2. One Jeremiah Tuti Okoko was authorized *vide* a written document titled “letter of authority” dated March 20, 2021 filed under Order 1 rule 13 of the [Civil Procedure Rules](#) through the firm of Ms Kiarie & Co Advocates the following day to plead, appear, swear and generally act in on his own behalf and that of 16 persons who duly signed the said authority. The authority stated that the said Jeremiah Tuti Okoko was authorized to act in the application that accompanied it and subsequent ones and the hearing of the suit. Through the said authority the 17 persons who later made the impugned application continued to be represented by the law firm of Ms Kiarie & Co Advocates.
3. Contemporaneous with the filing of the notice of motion dated May 11, 2022 the said Jeremiah Tuti Okoko filed a notice of intention to act in person. It was dated May 11, 2022. In the notice of intention to act in person Jeremiah Tuti Okoko indicated that he had withdrawn instructions from Ms Kiarie & Co Advocates and was henceforth acting in person. Upon filing the document, Mr Jeremiah Tuti Okoko filed the application against which the preliminary objection was raised.

### **The Objection**

4. The preliminary objection was in the nature of seven (7) points which I summarize here after. The first one was that they were strangers to the proceedings hence had no locus standi to bring the application. The second one was that one Jeremiah Tuti Okoko had no authority to represent the other applicants as he was not an advocate. The third one was that the prayers sought in the application were in regard to maintaining peace and status quo on the ground hence the Police and Provincial Administration had nothing to implement. The fourth one that there was no evidence that the order was served on the plaintiffs; the fifth the application is an abuse of the process of court. The sixth that the application was designed to incorporate the police in upsetting the *status quo* hence made in bad faith; and the seventh and last that the application lacked merits and ought to have been struck out.

### **Determination**

5. I carefully considered the content of the preliminary objection. The parties did not file any written submissions on the issue while the law firm of Ms Kiarie & Co Advocates from which instructions had been withdrawn indicated on July 18, 2022 when the matter came up for fixing a date for the ruling herein that it left it to court to rule on the objection as by law required. The court formulated three issues for determination. These were:
  - a. Whether the points raised by the plaintiffs amounted to a preliminary objection.
  - b. Whether, if the points constituted a preliminary objection, they were merited.
  - c. What orders to, including on costs of the objection.
6. I begin by analyzing the first issue:

#### **a. Whether the points raised by the Plaintiffs amounted to a Preliminary Objection**

7. In determining an issue termed as a preliminary objection, the starting point for any court is being seized of an understanding of what amounts preliminary objection is. In the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold defined a Preliminary objection as follows:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

8. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] eKLR, the same court held that:

“We are of the considered view that if a party wishes to raise a preliminary objection and files in court a notice to that effect and is subsequently served on other parties to the suit, the preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the court to sufficiently prepare to meet the challenge. If it is only at the hearing that the preliminary objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

9. Also, in *Susan Wairimu Ndiangui v Pauline W Thuo & Another* [2005] eKLR, Musinga J as he then was held as follows:-

“A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

10. It is clear that a preliminary objection arises on a point of law only. Any factual point and matter that requires long drawn out argument to establish other than the law falls short of a preliminary objection. Any prayer to uphold it as such is discarded and left for determination at the merits stage. For these reasons, this court proceeds to analyze the points raised herein to consider whether or not they fall within the ambit of a preliminary objection.

11. The first one is that the applicants were strangers to the proceedings hence had no *locus standi* to bring the application. In essence the contention is that the applicants are not parties nor interested parties in this matter. On this, the question the court is whether the applicants were either plaintiffs or defendants or interested parties to the suit.

12. I have looked at the court record. I have also carefully analyzed the pleadings in this matter. What comes out clearly is that there are fourteen (14) plaintiffs and nine (9) defendants. Of these two adverse parties, none of the applicants is among them. Indeed, on April 20, 2021, the seventeen (16) applicants moved this court *vide* an application dated the same date. Of the prayers sought in the said notice of motion which was filed under certificate of urgency, prayer No 4 which I consider relevant for purposes of the instant objection was for an order that the “court be pleased to enjoin the applicants as interested parties in this suit.” The application was neither fixed for hearing nor prosecuted. It was not allowed by consent either.

13. It goes then without saying that as of today, the applicants have never been made parties on whatever nature in this suit. In the circumstances any prayers or applications sought by them, whether as individuals or as a group are nothing but strange fumes in the sweet fragrance of the plaintiffs and defendants in these proceeds. The court cannot allow non-parties who are at best busy bodies to bog down the business of the court in an otherwise straightforward process. For that reason, the first point of the preliminary objection would succeed and it does. And since the first point has succeeded, this



court shall not engage in the consideration of the other points as that would amount to an academic exercise and a waste of the valuable time.

14. The upshot is that the preliminary objection succeeds. The application dated May 11, 2022 is therefore dismissed with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

