



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi & 5 others v Wanyoike & 6 others (Environment & Land Case
204 of 2017) [2022] KEELC 13558 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 204 OF 2017
LN GACHERU, J
OCTOBER 13, 2022**

BETWEEN

**THOMAS NGARACHU NGUGI 1ST PLAINTIFF
MARY NJAMBI NGUGI 2ND PLAINTIFF
SIMON KURIA KUNG’U 3RD PLAINTIFF
DAVID MWAURA KANGETHE 4TH PLAINTIFF
JOSEPH GITAU WAITHERA 5TH PLAINTIFF
JOSEPH NDEGWA KANGETHER 6TH PLAINTIFF**

AND

**JOHN WILFRED WANYOIKE 1ST DEFENDANT
FRANCIS NJUGUNA KARANJA 2ND DEFENDANT
JOHN IRUNGU WAWERU 3RD DEFENDANT
DAVID NGIGE MWANGI 4TH DEFENDANT
MBIYU MWAURA 5TH DEFENDANT
COUNTY GOVERNMENT OF MURANGA 6TH DEFENDANT
ATTORNEY GENERAL 7TH DEFENDANT**

RULING

1. Through a notice of preliminary objection dated April 20, 2022, the objector herein sought to strike out with costs the notice to show cause dated March 14, 2022, on grounds that the said notice to show cause was discriminatory within the meaning of article 27 of the [Constitution of Kenya, 2010](#).



2. It is the Objector's contention in the aforementioned Notice of Preliminary Objection, that 5th Defendant/Applicant has chosen the 1st Plaintiff/Objector for victimization in the enforcement of the Decree herein which has been issued against all the Plaintiffs contrary to Article 27 of the *Constitution of Kenya*. That no one shall be imprisoned merely on the ground of their inability to fulfil a contractual obligation as provided for in Articles 9 & 11 of the 1966 *International Covenant on Civil and Political Rights*. Further, that in the case of *Rachael Mwikali Mwandia v Ken Maweu Kasinga* (2013) eKLR, and the case of *Peter Okwako Murwa v Sylvanus Immanuel Walustachi* (2015) eKLR, the Courts held that enforcing execution by way of committal to jail is unconstitutional.
3. In addition, that the Court is supposed to look at its record in hearing a Preliminary Objection as was held in the case of *George W M Omondi & Another v National Bank of Kenya Ltd & 2 others* (2001) eKLR. That an Applicant who seeks committal to civil jail should discharge the burden of proof that the later has means to pay the entire decretal sum or some substantial part thereof, and has neglected to do so, as was held in the case of *WG Wambugu & Co Advocates v Emma Muthoni Wambaa & 10 others* (2021) eKLR.
4. The instant Preliminary Objection was canvassed by way of written submissions.
5. The Objector filed his written submissions dated May 19, 2022, through the Law Firm of Kamau Kuria & Company Advocates. The Objector reiterated his averments in the Notice of Preliminary Objection and also relied on the laws and precedents therein attached. He urged this Court to uphold the objection and strike off the Notice to Show Cause with costs.
6. The 5th Defendant on the other hand filed his written submissions dated May 23, 2022, through the Law Firm of JN Mbutia & Co Advocates. It is his submissions that the instant Preliminary Objection is not proper in law. That a Preliminary Objection cannot lie where a NTSC has been filed as a party served with and NTSC must Show Cause and must show up individually or through his advocate or pay the Decretal Sum. He relied on a litany of cases and urged this Court to dismiss the instant Preliminary Objection with costs for being premature and vexatious. That the Preliminary Objection does not raise pure points of law as some facts need to be ascertained and finally that a NTSC cannot be determines in a Preliminary Objection.
7. The Court has carefully read and considered the Preliminary Objections together with the rival written submissions and finds that the issue for determination is whether the Notice of Preliminary Objection is merited
8. A Preliminary Objection was described in the case of *Mukisa Biscuits Manufacturing Co Ltd...v... West End Distributors Ltd* (1969) EA 696 to mean: -

So far as I am aware, 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”.

9. Further Sir Charles Nebbold, JA stated that: -

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. The improper raising of points by way of Preliminary



Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

10. Further, the Supreme Court in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* [2015] e KLR, expanded the above principle and gave further rationale for raising a Preliminary Objection. It delivered itself thus:

1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose off the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.
2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. ...
3.

11. In the aforementioned case, the Superior Court went on to state that;

The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

12. The above being the description of Preliminary Objection, it is evident that a Preliminary Objection, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the Court is called upon to exercise judicial discretion.

13. In determining this Preliminary Objection, the Court takes into account that a Preliminary Objection must stem from the pleadings and that it raises pure point of law. See the case of *Avtar Singh Bhamra & another...v.... Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, where the Court held that: -

A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

14. In the instant case, the objector has approached this Court to strike out with costs the Notice to Show Cause dated March 14, 2022, on the ground that the said Notice to Show Cause was discriminatory, within the meaning of Article 27 of the *Constitution of Kenya, 2010*.

15. Another ground the objector brings the instant Preliminary Objection is Article 9 and 11 of the *International Convention of Civil and Political Rights*, which provides that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation and has been ratified and endorsed by various Courts.



16. It is trite that a Preliminary Objection must raise a pure 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.
17. 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.
18. In the case of *Sella Rose Anyango v Attorney General & 2 others* [2021] eKLR, the Court was held that;
 13. 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.
 14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
 15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a “finding of fact”) usually depends on particular circumstances or factual situations.”
19. Based on the foregoing this Court will now move to probe if the Preliminary Objection herein raises pure points of law.
20. A pure point of law is one 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. This Court is of the view that while Article 27 of the *Constitution of Kenya* and Article 9 and 11 of the *International Convention of Civil and Political Rights*, which forms part of Kenya’s law by dint of Article 2 of the *Constitution*, and they raise serious legal issues for consideration by this Court, the same do not raise pure points of law as herein above described.
21. To determine the issue of discrimination with regards to Article 27 above mentioned, the Court will in the interest of justice be required to call for evidence. An issue of infringement of the right to discrimination cannot be inferred directly from the pleadings, as doing so will amount to condemning one party unheard which is a grievous miscarriage of Justice.
22. With regards to Article 9 and 11 of the *International Convention of Civil and Political Rights*, this Court notes that the same forms part of Kenyan law by dint of Article 2(6) of the *Constitution of Kenya*. The said Article provides for the right to liberty, Security of person and the right against arbitrary arrest. Article 11 provides further that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. While this Court is guided by the above provisions, it disagrees with the objector that execution by way of committal to civil jail is unconstitutional and has been declared so by various Courts.
3. This Court has perused the case of *Rachael Mwikali Mwandia v Ken Maweu Kasinga* (2013) eKLR, and the case *Peter Okwako Murwa v Sylvanas Immanuel Walustachi* (2015) eKLR as cited by the Objector herein. The Court notes that while the said cases confirmed that indeed committal to civil jail



indeed curtails the right to liberty and freedom of movement of a Judgment Debtor, the same should be resorted to as a last option by a Decree Holder. This, the Court notes cannot and should not be interpreted to mean that the said mode of execution is unconstitutional. It means that indeed this method of execution is still an available option for execution, but a Decree Holder must prove to the Court that they have exhausted all other means.

24. It is therefore very clear that the issues of Article 9 and 11 of the *International Convention of Civil and Political Rights*, cannot be determined in a Preliminary Objection, as they are not pure points of law and will require the calling of evidence by both parties before the Court can determine the same.
25. The Upshot of the foregoing is that the Preliminary Objection herein dated April 20, 2022, has failed to meet the criteria and tenets of a Preliminary Objection as enumerated in the Mukisa Biscuits Manufacturing case (supra).
26. Based on the foregoing, this Court finds and holds that the Preliminary Objection dated April 20, 2022, is not merited and the same is dismissed entirely with costs to the 5th Defendant/Applicant.
27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH DAY OF OCTOBER, 2022

L. GACHERU

JUDGE

In the presence of; -

Joel Njonjo – Court Assistant

Mr Munyiri for the 1st Plaintiff/Respondent/Objector

Mr Munyiri for the 2nd – 6th Plaintiffs

Mr Kimwere for the 1st – 4th Defendants

Mr Mbuthia for the 5th Defendant/Applicant

Mr Kimwere for the 6th Defendant

7th Defendant – Absent

L. GACHERU

JUDGE

13/10/2022

