



**Kenya National Organization of Victims of Ethnic Clashes (KNOVEC) v
Ministry of Lands and Physical Planning & another (Environment & Land
Petition 23 of 2021) [2022] KEELC 15370 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 23 OF 2021
CA OCHIENG, J
DECEMBER 19, 2022
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION
UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT
NO. 4 OF 2015
AND
IN THE MATTER OF DISPUTE OVER LAND PARCEL NO. 10425
ATHI RIVER**

BETWEEN

**KENYA NATIONAL ORGANIZATION OF VICTIMS OF ETHNIC CLASHES
(KNOVEC) PETITIONER**

AND

MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. What is before court for determination is the respondents' notice of preliminary objection dated the January 10, 2022 which is premised on the following grounds:
 1. That the suit falls under the doctrine of *sub judice* as there are pending suits on the ownership of the suit land.



2. That this court lack jurisdiction to hear the suit herein by virtue of the express provision of Section 6 of the [Civil Procedure Act](#).
 3. That the following suits are pending in respect to the same subject matter: Machakos ELC 155/2016, Machakos ELC Petition 10 of 2018 as consolidated with ELC Case No 74 of 2014 *Julius Mutie Mutua & 2 Others (suing as officials of Aimi Ma Lukenya Society) v East African Portland Cement & Others*.
 4. That the Petitioner lack the capacity to institute the suit herein.
 5. That the suit is bad in law, misconceived and an abuse of the court process.
2. The notice of preliminary objection was canvassed by way of written submissions.

Analysis and Determination

3. Upon consideration of the notice of preliminary objection dated the January 10, 2022 including the rivalling submissions, the only issue for determination is whether the Petitioner has capacity to institute this Petition and if the said Petition is sub judice.
4. The Respondents in their submissions contend that this Petition is sub judice as there are related suits over the subject matter which is parcel number 10425, hereinafter referred to as the ‘suit land’. They aver that despite the Petitioner claiming East African Portland Company sought to evict them from the suit land, they have not included it, in this Petition. They further argue that the Petitioner lacks capacity to institute this suit as it can only sue through its trustees, if it has one or in the names of its officials in a representative capacity. To support its arguments, it relied on Section 6 of the [Civil Procedure Act](#) as well as the following decisions: [David Ndiu & Others v Attorney General & Others](#) [2021] eKLR; [Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others](#) [2020] eKLR; [Trustees Kenya Redeemed Church & Another v Samuel M’Obuya Morara & 5 others](#) [2011] eKLR; [African Orthodox Church of Kenya v Charles Omuroka & Another](#) [2014] eKLR; [Kituo Cha Sheria v John Ndirangu Kariuki & Another](#) [2013] eKLR; [John Ottenyo Amwayi & 2 Others vs Rev George Abura & 2 others](#) Civil Appeal No 6339/1990 and [David Kamau Njoroge \(Deceased\) v Savings & Loan \(K\) Ltd](#) [2006] eKLR.
5. The Petitioner in its submissions insists it has locus to institute this suit and relied on Article 22 of the [Constitution](#) as well as Rule 4 of the [Constitution of Kenya](#) Practice and Procedure Rules. It avers that the Respondents have not filed any documents to enable the court determine whether Machakos ELC No 155 of 2016 and Machakos Petition No 10 of 2018 deal with the same dispute. It explained the process it undertook to acquire the suit land. Further, it states that it is not a party in ELC No 155 of 2016 and is not aware of ELC Petition No 10 of 2014. To support its averments, it relied on the decision of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* 196 EA 696.
6. On perusal of the Petition herein, I note the fulcrum of the dispute revolves around a claim for suit land and various violations the Petitioner claims its members have been subjected to, by the Respondents. The Petitioner has outlined how it acquired the suit land and contends that the Respondents has taken it, without compensating them. In opposition to the Petition, the Respondents only filed the instant notice of preliminary objection.
7. In the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* [1969] EA 696; the Court held 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 has 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 nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

8. While the Supreme Court addressed its mind on this issue in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* [2015] eKLR and stated that:

“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.” [Emphasis added]

9. Further in the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, 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.”

10. In the first instance, the Respondents have claimed the Petitioner does not have *locus standi* to institute this suit. On capacity to sue, Article 22 (1) and (2) of the *Constitution* provides that:

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— (a) a person acting on behalf of another person who cannot act in their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in the public interest; or (d) an association acting in the interest of one or more of its members.”

11. See also Rule 4 of the *Constitution of Kenya* Practice and Procedure Rule.

12. On relying on these Constitutional provisions, it is clear that an association can indeed file a suit on its own and does not require trustees or representatives to do so. I will hence decline to allow the Preliminary Objection on this ground.

13. The Respondents have further claimed the Petition is sub judice as the following suits are pending in respect to the same subject matter: Machakos ELC 155/2016, Machakos ELC Petition 10 of 2018 as consolidated with ELC Case No 74 of 2014 *Julius Mutie Mutua & 2 Others (suing as officials of Aimi Ma Lukenya Society) v East African Portland Cement & Others*. In this instance, the Respondents have not provided any pleadings, or documents to confirm that the Petitioner is indeed a party to the above cited suits which are dealing with the same issue or title as in the instant Petition. To my mind I find that the Respondents’ averments also require evidentiary proof which has not been presented. From the explanation in the Petition including the Supporting Affidavit which remains uncontroverted, while associating myself with the decisions I have cited, it is my considered view that since the Respondents failed to expressly deny the Petitioner’s averments, their Preliminary Objection is premature as it does not stem from any pleadings.

14. It is against the foregoing that I find the notice of preliminary objection dated the January 10, 2022 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF DECEMBER, 2022



CHRISTINE OCHIENG
JUDGE

