



Naka Estate Residence Association v Ense Limited & 33 others (Environment & Land Petition 15 of 2021) [2023] KEELC 594 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 15 OF 2021**

A OMBWAYO, J

FEBRUARY 9, 2023

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 2(1), 10, 21, 22, 23
(1) & (3), 27, 40 (3) & 6, 47 & 48 OF THE CONSTITUTION OF
KENYA, 2010**

-AND-

**IN THE MATTER OF ARTICLE 62 (1) AND 66 (1) OF THE
CONSTITUTION OF KENYA, 2010**

-AND-

**IN THE MATTER OF SECTION 8, 9, 10, 12 AND 14 OF THE LAND
ACT NO. 6 OF 2012**

-AND-

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

BETWEEN

NAKA ESTATE RESIDENCE ASSOCIATION PETITIONER

AND

ENSE LIMITED & 33 OTHERS RESPONDENT



RULING

Brief Facts

1. The 19th respondent filed the instant preliminary objection dated February 9, 2022 seeking that the petition be struck out on the grounds that the plaintiff lacks the necessary legal capacity to commence the suit in its own name, making the suit incurably defective and must be struck out. That the stated Naka Estate Residence Association, duly registered under the *Societies Act*, is not a legal entity that can sue or be sued in its own name. The petitioner did not file any response to the preliminary objection. The 19th respondent filed its authorities dated December 13, 2022 in support of its preliminary objection. This was in place of its submissions. The petitioner and other respondents did not file their submissions.

Analysis and Determination

2. The preliminary as it stands remains uncontroverted as the petitioner did not file any response or submissions opposing it. However, the court still has a duty to consider the law.
3. The definition of a preliminary objection was well set out in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 where it was held;

“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 objection may dispose of the suit.”

Sir Charles Newbold in the same matter stated thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion confuse the issue. The improper practice should stop.”

4. In *Artar Singh Bhamra & Anor v Oriental Commercial Bank* – Civil Suit No 53 of 2004 – High Court Kisumu the court held:

“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.”

5. A perusal of the petition and annexures confirms that the petitioner is a society registered under the *Societies Act*. Being a society under the *Societies Act*, the issue being raised in the preliminary objection is whether the petitioner can sue in its own name, as it has done. This to me is a noble legal question which goes to the root of the matter herein. It is a point of law which could dispose of the case depending on how it goes. I therefore find the issue raised satisfy the principle in the Mukisa Biscuit case.



6. In the case of *Trustees Kenya Redeemed Church & Anor v Samuel M'Obiya & 5 others* [2011] eKLR it was held thus:

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya redeemed church nor has it been pleaded that he has been sued in his personal capacity.”

7. Further in the case of *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank Nairobi* HCCC No 4116 of 1992 Justice Bosire (as he then was) stated thus:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of order 1 rule 8 Civil Procedure Rules.”

8. In the instant matter, the suit is instituted in the name of a society. It is not a body corporate for it to sue as a legal personality. That being so it lacks the capacity to institute proceedings in its own name.

9. Similarly, in the case of *African Orthodox Church of Kenya v Rev Charles Omuroka & Anor* [2014] eKLR. Justice EC Mwita in his ruling on a preliminary objection raised challenging the plaintiff's capacity to sue in its own name stated as follows:

“The plaintiff has pleaded in paragraph 1 of its plaint that it is a duly registered church. At paragraph 3 of the plaint, the plaintiff has described the 2nd defendant as a duly registered church or organization obviously churches are societies under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names.”

10. In view of the foregoing, the preliminary objection dated February 9, 2022 is merited and is allowed. The petition is struck out. Each party shall bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9TH DAY OF FEBRUARY 2023

A.O. OMBWAYO

JUDGE

