



**Mativa & 2 others v Registered Trustees, Catholic Diocese of Machakos & 6 others (Environment & Land Petition E005 of 2021) [2023] KEELC 20715 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20715 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND PETITION E005 OF 2021**

**TW MURIGI, J**

**OCTOBER 4, 2023**

**BETWEEN**

**DR BONIFACE MUTUNGA MATIVA ..... 1<sup>ST</sup> PETITIONER**

**DR ABEDNEGO KIWIA MAVUTHU ..... 2<sup>ND</sup> PETITIONER**

**MR PETER MAKOANI KINYANZUI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**REGISTERED TRUSTEES, CATHOLIC DIOCESE OF MACHAKOS .... 1<sup>ST</sup>  
RESPONDENT**

**NATIONAL LAND COMMISSION OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL EDUCATION BOARD ..... 3<sup>RD</sup> RESPONDENT**

**MAKUENI COUNTY EDUCATION BOARD ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**BOARD OF MANAGEMENT ITAAVA PRIMARY SCHOOL . 6<sup>TH</sup> RESPONDENT**

**COUNTY LAND REGISTRAR MAKUENI ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. By an amended petition dated June 22, 2021, the petitioners herein are seeking the following orders:-
  1. A declaration that the occupation, claim of ownership, use and enjoyment of the one hectare of land parcel No Nzau/Kikumini/595 or any part thereof belonging to Itaava Primary school by the Catholic Diocese of Machakos through its constituent church is a violation of article 1, 2, 10, 27, 28, 53, 62 and 73 and should therefore be declared as null and void.



2. A mandatory injunction do issue commanding the 1<sup>st</sup> respondent to demolish and or remove all the constructed structures, houses and fences on Nzai/Kikumini/595 and to clear all debris therefrom failure to which the ownership, use and enjoyment of the same do revert to Itaava Primary School.
  3. A permanent injunction to issue restraining the 1<sup>st</sup> respondent either by themselves, agents, employees, servants or whomsoever from trespassing, alienating, sub-dividing, beaconing, fencing, transferring, surveying and or in any way dealing with land parcel Nzai/Kikumini/595.
2. The petition is supported by the affidavit of Dr Boniface Mutunga Mativa sworn on his own behalf and on behalf of his co petitioners.
  3. Thepetition was opposed by the 1<sup>st</sup>, 3<sup>rd</sup> - 7<sup>th</sup> respondents *vide* the grounds of objection dated July 22, 2022 and by the replying affidavits sworn by Rev Fr Francis Kioko Ngonyo and by Gachungi J. Murithi on April 6, 2022.
  4. The 2<sup>nd</sup> respondent did not file a response to the petition.
  5. The parties were directed to canvass the petition by way of written submissions. The petitioners submissions were filed on September 27, 2022while the 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> respondents submissions were filed on November 25, 2022. Consequently, a judgment date was fixed for May 24, 2022 but due to pressure of work, the judgment date was rescheduled to October 5, 2023.
  6. When I retired to write the judgment, I noted that the petitioners had in their submission raised a preliminary objection on the competency of the Attorney General to represent the 1<sup>st</sup> respondent in the proceedings herein.
  7. It is trite law that a preliminary objection can be raised at any time before the conclusion of the matter. It is imperative that I first determine the preliminary objection before retiring to write the judgment in the petition herein.
  8. Counsel for thepetitioners submitted that that the Attorney General has no capacity to represent the 1<sup>st</sup> respondent because it is a private entity. To buttress this point, counsel relied on article 156(4) and 156(4)(c) of Constitution and on the office of the Attorney General Act which outlines the functions of the Attorney General. Counsel contended that the Office of the Attorney General can only represent the government and not private entities.
  9. Counsel contended that by purporting to represent the 1<sup>st</sup> respondent in the proceeding herein the Attorney General acted contrary to the powers granted under Constitution. Counsel submitted that the 1<sup>st</sup> respondent is a private entity tasked with evangelical work and thus the affidavit as drawn and filed by the Attorney General is null and void and should be expunged from the record.
  10. To buttress this point counsel relied on the case of Coalition for Reform and Democracy (CORD) & Another v the Republic of Kenya & Another 2015 eKLR.
  11. I have carefully read the submissions filed on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> respondents by the Office of the Attorney General. The Hon Attorney General did not respond to the preliminary objection raised by the petitioners in their submissions.



## Analysis And Determination

12. Having considered the preliminary objection and the submissions filed on behalf of the petitioners, the only issue that arises for determination is whether the Attorney General has the capacity to act for a private entity.
13. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law.
14. The principles as to what constitutes a preliminary objection were laid down by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, where Law JA stated as follows:-

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. Further on Sir Charles Newbold JA stated:-

“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 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. The petitioners preliminary objection is based on the grounds that the Attorney General lacks the capacity to represent a private entity. The issue of representation is a pure point of law. The notice of preliminary objection raised by the petitioners fits the description of what amounts to a preliminary objection as stated in the *Mukisa Biscuits Case* (supra).
17. The office of the Attorney General is established under article 156 (1) of Constitution. Article 156(4), (5) and (6) of Constitution provides as follows;

(4) The Attorney-General—

- (a) is the principal legal adviser to the Government;
- (b) shall represent the national Government in Court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings; and
- (c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.

(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.”



18. From the reading of article 156(4)(b) it is crystal clear the Attorney General shall represent the National Government in court or legal proceedings other than criminal proceedings.
19. In 2012, Parliament pursuant to its functions as provided by article 156(4)(c) enacted the [Office of the Attorney General Act](#) of 2012. Section 5(1) states that the functions of that office are as follows;
- a. advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;
  - b. advising the Government on all matters relating to [Constitution](#), international law, human rights, consumer protection and legal aid;
  - c. negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies;
  - d. coordinating reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report;
  - e. drafting legislative proposals for the government and advising the government and its agencies on legislative and other legal matters;
  - f. reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire Functions of the purchase and coat of arms;
  - g. reviewing and overseeing legal matters pertaining to the administration of estates and trusts;
  - h. in consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;
  - i. representing the national Government in all civil and constitutional matters in accordance with the [Government Proceedings Act](#);
  - j. representing the Government in matters before foreign courts and tribunals; and
  - k. performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.”
20. [Constitution](#) has not defined the National Government. However, in the case of [Judicial Service Commission v Speaker of the National Assembly & 8 others](#) [2014] eKLR the learned judges observed as follows:-
- “[Constitution](#) does not define the national government, but it is implicit in its provisions that the national government is the national executive, the legislature and the judiciary as opposed to the county or devolved government. That being the case, any dispute in court that involves either of these organs of state to which the people of Kenya have delegated their sovereign power are proceedings in which the AG has a constitutional duty to appear.”
21. It is crystal clear that the 1<sup>st</sup> respondent is not a state department, or organ of the National Government. The 1<sup>st</sup> respondent does not get public funding from the National or County Governments in the performance of its duties and neither does it procure legal advice from the Attorney General in its day-to-day affairs. It is responsible for its own private decisions.
22. In this case, the Attorney General drew and filed a notice of appointment of advocates, grounds of opposition and a replying affidavit on behalf of the 1<sup>st</sup> respondent. As correctly submitted by counsel



for the petitioners, the 1<sup>st</sup> respondent is a faith-based organization and is therefore not entitled to representation from the Office of the Attorney General. It therefore follows that the 1<sup>st</sup> respondent's representation by the Attorney General is irregular.

23. In light of the foregoing, the notice of appointment of advocates dated July 22, 2021, the grounds of opposition dated July 30, 2021, and the replying affidavit sworn by Rev Fr Kioko Ngonyo on April 6, 2022 are hereby struck out with no orders as to costs.
24. The 1<sup>st</sup> respondent is at liberty to appoint private legal counsel to represent it in these proceedings within fourteen days of the date hereof.

.....  
**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023.**

**IN THE PRESENCE OF:-**

Court assistant - Mr. Kwemboi.

Kalwa for the Petitioners

