



**Harambee Children Therapy Centre Kinderhilfs Projekt v Kenya
Railways Corporation & 2 others (Environment and Land Case Civil
Suit 1391 of 2016) [2022] KEELC 3238 (KLR) (6 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1391 OF 2016**

EK WABWOTO, J

JUNE 6, 2022

BETWEEN

**HARAMBEE CHILDREN THERAPY CENTRE KINDERHILFS
PROJEKT PLAINTIFF**

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 2ND DEFENDANT

ELIZABETH WAMBUI 3RD DEFENDANT

RULING

(Ruling in respect to the Plaintiff’s Notice of preliminary objection dated January 27, 2022)

1. This Ruling is in respect to the notice of preliminary objection dated January 27, 2022 that was filed by the Plaintiff herein. In the said preliminary objection, the plaintiff sought to have the Amended statement of defence filed by the 1st defendant struck out for the reasons that it was filed without leave of the court.
2. Pursuant to the directions that were issued by this court differently constituted on 1/02/2022, the Plaintiff was directed to file written submissions in respect to the preliminary objection within 3 days and upon service the defendants were equally supposed to file their written submissions within 3 days upon which the court was to render its ruling on 05/04/2022.
3. A perusal of the court record confirms that no written submissions have been filed by either party at the time of preparation of this Ruling. That notwithstanding, I have considered the preliminary objection basing on the pleadings on record and the main issue for consideration is whether or not the preliminary objection is merited.



4. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696 has been the watershed as to what constitutes preliminary objection. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* (1965) eKLR also aptly captured the legal principle when it stated as follows:

“.....A preliminary objection 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”

Equally in *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 (2014) eKLR, the Supreme court stated that

“.....a Preliminary Objection consist of a point of law which has been pleaded or which arises by clear implicates out of pleading and which if argued as a Preliminary point may dispose of the suit”

5. In the instant case, the gist of the Preliminary Objection is that the 1st defendant’s Amended Statement of Defence dated December 7, 2021, was filed without leave of the court or extension of time thereof.

I have taken the task of perusing the court record when the proceedings were undertaken before my sister Hon. Lady Justice J. Mogeni and I note that on the December 7, 2021, the following directions were issued by her Ladyship. The same is quoted verbatim: -

“ Counsel for the 1st defendant is at liberty to file their documents today as she has stated and serve the parties. The plaintiff’s Counsel is at liberty to file any response if need be.”

6. The plaintiff’s in their Preliminary Objection have clearly stated that the Amended statement of defence dated December 7, 2021 was served to them on the same day.

7. Having considered the above, it is my view that the 1st defendant Amended Statement of Defence was filed on the same day the court gave them the permission to do so. At this point, it does not matter whether or not the directions did not specifically state “leave to file an amended statement of defence” since it is evident that they were granted permission to file their documents and the plaintiff equally granted permission to respond.

8. As was stated in the case of *Oraro v Mbaja* (2005) 1KLR 141

Anything that purports to be a preliminary objection must no deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

a Preliminary Objection must not be blurred with factual details liable to be contested. It is therefore the finding of this court that the Preliminary Objection herein does not meet the threshold set out in *Mukisa Biscuit’s case (supra)*. The same is unmerited and is hereby dismissed. The costs therein reserved to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF JUNE 2022.

E.K. WABWOTO

JUDGE

In the virtual Presence of:-



Court Assistant-Caroline

Mr. Wahiga for Plaintiff

Ms. Akoth Alouch for 1st Defendant.

Ms. Omwoyo holding brief for Mogaka for 3rd Defendant

E.K. WABWOTO

JUDGE

