



**Community v Haji & 2 others (Environment & Land Case  
E005 of 2021) [2022] KEELC 3824 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3824 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E005 OF 2021**

**MN KULLOW, J**

**JULY 8, 2022**

**BETWEEN**

**NAROK MUSLIM COMMUNITY (SUING THROUGH AHMED ABDI YUSUF  
REPRESENTATIVE OF THE COMMUNITY ..... PLAINTIFF**

**AND**

**BASHIR MUSA HAJI ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR NAROK ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAROK ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. The 1<sup>st</sup> defendant herein filed a notice of preliminary objection dated March 14, 2021 in response to the plaintiff's notice of motion dated March 4, 2021, on the following grounds: -
  - a) That the suit is incompetent as the plaintiff, being an unincorporated body/ unregistered organization has no capacity to sue in the manner it has purported to do.
  - b) That the plaintiff / applicant does not have the requisite locus standi to institute this suit and therefore should be struck out with costs.
2. On May 19, 2021, this court issued directions on the disposal of the preliminary objection dated March 14, 2021 by way of written submissions. The plaintiff/respondent through the firm of Phiona Ogoi & Company Advocates, filed their submissions dated June 15, 2021, while the 1<sup>st</sup> defendant/applicant, through the firm of Namunyak Nkurunnah & Co. Advocates filed their submissions dated 30.05.2021 which I have taken into consideration in arriving at my ruling on the preliminary objection as hereunder;



### **Applicant's Submissions**

3. It was the applicant's submissions that Narok Muslim Community, the plaintiff herein, is not a registered entity capable of suing. That there is no demonstration that the person who instituted the suit had permission to bring the suit on behalf of the Group. Further, the applicant had not filed any authority to plead on behalf of the members of the said community or minutes authorizing the institution of the suit. He thus contends that a person who seeks legal redress, has to be identified so that orders are not issued in favor or against a person who cannot be precisely identified.
4. He relied on the following cases in support of his claim; *Bridge Hotel Ltd v Wilfred Mutiso Lai Jesus Celebration Centre* (2016) e KLR, *John Otenyo Amwayi -vs- Rev George Abura & Two others* Civil Appeal No. 6339/90, *Kipsiwo Community Self Help Group v Attorney General & 6 others* (2013) e KLR, *Andrew Ireri Njeru v Embu Nyangi Ndiiri Proposed Society Chairman & others vs Daniel Ng'ang'a Gakii & anor* [2015] eKLR and *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR.

### **Respondent's Submissions**

5. Counsel for the plaintiff/ respondent's submitted that the preliminary objection is unsustainable since no substantive issues had been raised and further relied on article 159 (2) (a), (d) and (e) of the Constitution in support of their assertion.
6. Counsel further submitted that the plaintiff has direct authority from the Supreme Council of Kenya Muslims, which is registered as the umbrella body of all Muslims organizations, societies, Mosque Committees and groups in Kenya, given through the Resident Sheikh thereby giving the plaintiff capacity to sue on behalf of the Muslim Community involved in the dispute herein.
7. It was also their submission that the role of the 1<sup>st</sup> defendant was to act as a trustee of the Muslim communities but instead has overstep the said mandate whose effect is to deny the children an opportunity to access their Madrassa lessons and limit their rights and freedoms as guaranteed in the Constitution.
8. The sole issue for determination before me is whether the notice of preliminary objection dated 14/03/2021 is merited and I will proceed to discuss it as hereunder;
9. The law on preliminary objection is now well settled. In the celebrated case of *Mukbisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 EA 696; the Court defined preliminary objection as follows;

“...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”.
10. The position on what constitutes a preliminary objection was reiterated by the Supreme Court in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 others* [2015] eKLR and stated as follows:

“ 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.”
11. The 1<sup>st</sup> defendant/applicant has sought the dismissal of the plaintiff's suit instituted vide a plaint dated March 4, 2021 and the notice of motion on even date, on the basis that the plaintiff does not have the locus standi to institute the suit.



12. A brief background to contextualize the matter; the suit herein has been instituted by the plaintiff on behalf of the Narok Muslim Community, it is the plaintiff's contention that the suit parcel is a communal land meant for the construction of Madrassa and was entrusted to the 1<sup>st</sup> defendant. That the 1<sup>st</sup> defendant without any right assumed the care of the suit land for his personal and private use against the interests and rights of the larger Muslim Community. It is on that basis that the plaintiff sought an order of permanent injunction against the 1<sup>st</sup> defendant and a declaration that the Narok Muslim Community is the rightful owner of the suit property among other orders. The 1<sup>st</sup> defendant in response filed the instant preliminary objection.
13. I am guided by the Court of Appeal decision in the case of *Tanui and 4 others v Birech & 11 others* (1991) KLR at page 510, stated as follows;
 

“While it is not the business of the high court or the court of appeal to involve itself in the day to day running of institutions such as the church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the high court and the court of appeal would not only be entitled to but is under a duty to compel it, either, by injunction or otherwise, to obey its constitution....”
14. It is the applicant's contention that the plaintiff lacks the requisite capacity to institute the legal proceedings herein on the basis that the plaintiff – Narok Muslim Community, is not a registered organization and thus lacks the capacity to bring the suit in its name.
15. The plaintiff/ respondent on the other hand maintains that he has the requisite capacity to institute the suit herein having been expressly authorized by the Supreme Council of Kenya Muslims; which is the registered umbrella body of all Muslim Organizations, Societies, Mosque Communities and other groups. The Authority was given through the Resident Sheikh vide a letter dated March 2, 2021 expressly authorizing the plaintiff to act on behalf of the Muslim Community in Narok and proceed with the necessary action deemed fit in an attempt to address the issues in dispute between the community and the 1<sup>st</sup> defendant. He thus maintained that the preliminary objection does not raise any point of law and the same should be dismissed to allow the matter to proceed for hearing and determination on merit.
16. Article 260 of the *Constitution*, which is the interpretative section, defines "person" as follows: -
 

“person” includes a company, association or other body of persons whether incorporated or unincorporated;
17. I have carefully looked at the pleadings herein and I have noted that the claim herein is a public interest case; the suit has been filed for the general interest of the Narok Muslim Community. Article 22(2)c and d and article 258 of *the Constitution* aptly addresses the issue of public interest litigation and gives the requisite capacity to sue.
18. “Public interest” is defined in *Black's Law Dictionary*, 9<sup>th</sup> Edition (page 1350) as:
 

“the general welfare of the public that warrants recognition and protection” or “something in which the public as a whole has a stake, especially an interest that justifies governmental regulation”
19. The court adopted the finding in the Nairobi High Court Misc. Civil Application No 908 of 2001 *Albert Ruturi, JK Wanywela & Kenya Bankers Association v The Minister of Finance & Attorney*



*General and Central Bank of Kenya* famously referred to as the *Donde* Case. In the *Donde* Case the court it held in part that:

“...We state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In this type of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception.”

20. A similar position emerged in India where a liberal purposeful approach was applied in *Janata Dal VHS Chowdhary* where the court stated: -

“...the strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right locus standi to any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury by who is not a mere busybody or a meddlesome interloper; since the dominant object of PIL is to ensure observation of the provision of the Constitution or the law which can be best achieved to advance the cause of the Community ... or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in; motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict.”

21. Applying the foregoing to the present case, I find that the orders sought in the suit herein are not in personam but rather they are orders aimed to benefit the entire Narok Muslim Community. Even though I acknowledge that the Title of the pleadings seems erroneous, one Ahmed Abdiought to have directly used his name as the plaintiff on behalf of the Narok Muslim Community, a look at the substance contained in the pleadings it is evident that he is acting on behalf of the community. Further, the suit in dispute being a public property aimed to benefit the Muslim Community I find that striking out the suit will be a draconian measure and I therefore direct that the suit be resolved on merit.
22. The upshot of the foregoing analysis is that the 1<sup>st</sup> defendant/ applicant’s preliminary objection dated March 14, 2021 is not merited and the same is dismissed with no orders as to cost.

**DATED,SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF JULY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

