



**Chalbi Muslim Welfare Association v Board of Management, Maikona, Primary School & 2 others  
(Constitutional Petition E005 of 2023) [2025] KEHC 2036 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2036 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CONSTITUTIONAL PETITION E005 OF 2023**

**FR OLEL, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**CHALBI MUSLIM WELFARE ASSOCIATION ..... PETITIONER**

**AND**

**BOARD OF MANAGEMENT, MAIKONA, PRIMARY SCHOOL .... 1<sup>ST</sup>  
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**A. Introduction.**

1. Before the court for determination is the Notice of Motion Application dated 22<sup>nd</sup> May 2024 filed pursuant to provisions Section 1A, 1B, and 3A of the *Civil Procedure Act*, Order 40 Rule 3 of the Civil Procedure Rules, and all other enabling provisions of law. The Applicant seeks for Orders that;
  - a. Spent.
  - b. That the orders granted herein on 7<sup>th</sup> November 2023 be enforced by the officer commanding station (OCS) of Maikona Police station in Marsabit county and file a report in compliance within Seven (7) Days from the date of the order.
  - c. That there be an order that the 1<sup>st</sup> respondent should not participate in these proceedings until it purges the contempt through the head teacher, Mr. Ibrae Koke Kiro.
  - d. That the 1<sup>st</sup> respondent's head teacher Mt Ibrahim Koke Kiro be and is hereby committed to imprisonment for a term of six (6) months for violation and/or breach of the court orders granted herein on 7<sup>th</sup> November 2023.



- e. That costs of this Application be borne by the 1<sup>st</sup> Respondent in any event.
  - f. That costs of this Application be provided for.
2. The application is supported by the grounds made on the face of the said Application and the supporting affidavit of Godana Hersi Ibrahim, who deponed that this court had granted injunctive orders on 07.11.2023 that restrained the 1<sup>st</sup> respondent through its head teacher from implementing the ban barring pupils professing Muslim faith at Maikona primary school from wearing Hijab uniform.
  3. The said order was served upon the 1<sup>st</sup> respondent's headteacher on 20.02.2024, he acknowledged service of the said order but had refused to heed the directives issued therein. All parties had a duty to obey valid court orders and the 1<sup>st</sup> respondent having willfully failed to obey the subsisting valid order, ought to be punished. The applicant further sought that the 1<sup>st</sup> respondent's head teacher be barred from further participating in these proceedings until he purged his contempt.
  4. Finally, the Applicant also sought to have the court direct the OCS Maikona police station to enforce the injunctive order issued on 07.11.2024 and to subsequently file a report in court to confirm compliance.
  5. The 1<sup>st</sup> respondent in response filed a notice of preliminary objection dated 12<sup>th</sup> September 2024, where they raised the following grounds of objection, namely;
    - a. That the petition dated 19<sup>th</sup> October, 2023 together with any subsequent interim orders ought to be struck out of being in contradiction to the provisions of Section 3 of the Societies Act, Chapter 108 laws of Kenya.
    - b. That in the instant matter, the suit has been filed by a religious organization. It is not a body corporate capable of suing or being sued as a legal personality. That being so, it lacks the capacity to be sued in its own name.
    - c. That a society, as the petitioner describes itself in this petition, can only sue or be sued through its officials. The petition does not disclose the petitioner's registered officials who ought to institute the suit on behalf of its members.
  6. The 1<sup>st</sup> respondent urged the court to uphold the preliminary objection and to dismiss this petition with costs.

## **B. Determination.**

7. I have considered the pleadings filed, the preliminary objection raised and the submissions filed by the respective parties. It is trite law that the preliminary objection must be dealt with and disposed of first before the substance of the main suit is dealt with.
8. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same was set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, Where at page 700 Law JA stated that:

“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 point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.



In the same case, at page 701, Sir Charles Newbold, P. stated:

“ 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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

9. Similarly, in *John Mundia Njoroge & 9 others Vrs Cecilia Muthoni Njoroge & Another* (2016) eKLR, the Honourable court outlined the grounds which could form the basis of a preliminary objection; -
  - i. Lack of jurisdiction over the subject matter of the action or the person of the respondent, improper venue or improper form or service of a writ of summons or a complaint;
  - ii. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
  - iii. Insufficient specificity in a pleading;
  - iv. Legal insufficiency of a pleading (demurrer);
  - v. Lack of capacity to sue, non-joinder of a necessary party or misjoinder of a cause of action; and
  - vi. Pendency of a prior action or agreement for alternative dispute resolution,” (Emphasis mine)
10. The issue raised by the 1<sup>st</sup> respondent, is a pure point of law since they challenge the petitioner's capacity to sue and/or to be sued.
11. Section 3 of the *Societies Act*, does not provide that any registered society can sue and/or be sued under its own name. In other words, it is not a juristic person and therefore must sue through its officials.
12. In the case of *John Otteyo Amwayi & 2 others v Reverend George Abura & 2 others* (Civil Appeal No 6339 of 1990), the court did hold as follows;

“The *Societies Act* does not contain provisions with regard to the presentation and prosecution of suits by or against the unincorporated societies. It would appear to me that the legislature did not intend that suits be brought by or against those societies in their own names.”
13. Further, in *Makete & 6 others ( suing for and on behalf of Elgon East Friends church ( Quaker Yearly Meeting ) v Lusweti & 5 others )*,( ELC Case No 10 of 2023)(2023) KEELC 17005, KLR, the court also allowed a similar preliminary objection and held inter alia

“In the present case, parties conceded that the suit church is an unincorporated body registered under the *Societies Act*. A reading of Section 3 of the said Act connotes that such a body cannot sue in its own name. Vindication of its rights can only be taken by the official holders therein. On this point, the pronouncement of Nambuye J (as she was then), in *living water church International v City Council of Nairobi* [2008] eKLR is instructive. In the same vein, Order 1 Rule 8 of the Civil Procedure Rules allows parties to file a suit on its own behalf by way of a representative suit.”



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

**C. Disposition**

15. In the circumstances I do find merit in the preliminary objection raised by the 1<sup>st</sup> Respondent. The result is that the petition herein is struck out with no orders as to costs.

16. It is so order

**READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 20<sup>TH</sup> DAY OF FEBRUARY 2024.**

In the presence of;

Mr. Ogutta for Petitioner

N/A for Respondent

Mr. Jarso Court Assistant

