



**Ngendo v Kenya Dental Association (Sued Through Its Officials) Timothy Theuri - Chairperson/ President; David Mundia - Vice Chairperson/ Vice President ; Douglas Oramis - Secretary General ; Elizabeth Bwibo - Treasurer) & another; Registrar of Societies & 11 others (Interested Parties) (Petition E337 of 2023) [2025] KEHC 1926 (KLR) (Constitutional and Human Rights) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1926 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E337 OF 2023**

**LN MUGAMBI, J**

**FEBRUARY 6, 2025**

**BETWEEN**

**FLORENCE NGENDO ..... PETITIONER**

**AND**

**KENYA DENTAL ASSOCIATION (SUED THROUGH ITS OFFICIALS)  
TIMOTHY THEURI - CHAIRPERSON/ PRESIDENT, DAVID MUNDIA- VICE  
CHAIRPERSON/ VICE PRESIDENT DOUGLAS ORAMIS - SECRETARY  
GENERAL ELIZABETH BWIBO - TREASURER) ..... 1<sup>ST</sup> RESPONDENT**

**KDA ELECTION BOARD (SUED THROUGH ITS OFFICIALS) .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**REGISTRAR OF SOCIETIES ..... INTERESTED PARTY**

**PETER JACKSON WAWERU ..... INTERESTED PARTY**

**GRACE MUGURE ..... INTERESTED PARTY**

**RENOH OMORO ..... INTERESTED PARTY**

**AYSHA MATHACHA ..... INTERESTED PARTY**

**JOHN NGORU NJUGUNA ..... INTERESTED PARTY**

**NELSON MALENYA ..... INTERESTED PARTY**

**TIM ALALA ..... INTERESTED PARTY**

**MARTIN OLUDHE ..... INTERESTED PARTY**



BRANICE MUNYASIA ..... INTERESTED PARTY  
ALBERT MUTUA ..... INTERESTED PARTY  
KIMANI KAMAU ..... INTERESTED PARTY

## RULING

### Introduction

1. The Petition dated 15<sup>th</sup> September 2023 was later on amended on 22<sup>nd</sup> September 2023. It challenges the legality of the Respondent's elections that took place on 17<sup>th</sup> June 2023 in accordance with Respondent's Constitution.
2. In response to the Petition, the Respondent filed a Notice of Preliminary Objection dated 7<sup>th</sup> November 2023.

### The Preliminary Objection

3. The Notice of Preliminary objection was premised on the following grounds:
  - i. This Court lacks jurisdiction to hear and determine this matter.
  - ii. The Respondent being a society registered under the *Societies Act* does not have the legal capacity to be sued in its own name.
  - iii. The Application and Petition are incompetent, bad in law, do not disclose any cause of action, and is otherwise an abuse of the court process.

### Petitioner's Case

4. In rejoinder the Petitioner filed her Replying Affidavit sworn on 24<sup>th</sup> November 2023.
5. First, she faults the Respondent's advocate's failure to disclose the name of the person they are representing in the Notice of appointment. Moreover she argues that there is no consent or resolution by the Respondent's officials filed by its Counsel.
6. She asserts that the preliminary objection does not raise any pure points of law as it consists of disputed facts.
7. She as well avers that she sued the Respondent through its officials as required by the law as is clear from her amended pleadings. She stresses that the sued officials did not deny that they are the Respondent's officials.
8. The Petitioner argues thus that the matters raised in the preliminary objection are moot and that this Court has the requisite jurisdiction to hear this matter.

### Parties' Submissions

#### Respondent's Submissions

9. The firm of V.A. Nyamodi and Company Advocates filed submissions on behalf of the Respondent dated 16<sup>th</sup> November 2023. Counsel raised two issues for determination: first, whether this Court has



jurisdiction to hear and determine the suit and second, whether the Respondent has the legal capacity to be sued.

10. On the first issue, Counsel relying on Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR submitted that jurisdiction is paramount and should be dealt with in the first instance. Like dependence was placed in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR.
11. In this regard, Counsel stressed that the Respondent is an association registered under the *Societies Act* and further governed by its own Constitution. As such, Counsel stated that the Respondent is a private body governed by its own rules and hence the matter herein does not raise any constitutional issues that require an interpretation.
12. Accordingly Counsel argued that for the Petitioner to invoke this Court's jurisdiction, the Petitioner must demonstrate the matter that requires an interpretation of *the Constitution* such as if the act or omission is inconsistent with *the Constitution*.
13. Reliance was placed in Ismail Srrugo v Kampala City Council and The Attorney General, Constitutional Appeal No.2 of 1998 (SC) where it was held that:

“The petition (read reference) must show on the face of it, that interpretation of a provision of *the constitution* is required. It is not enough to allege merely that a constitutional provision has been violated. The applicant must go further to show prima facie, the violation alleged and its effect before a question could be referred to the constitutional court.”
14. Equal dependence was placed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
15. On this premise, Counsel submitted that this Court does not have jurisdiction to entertain the matter owing to Section 18 of the *Societies Act* as read with Article 159 (2) of *the Constitution* and Section 9 (2) and (3) of the *Fair Administrative Action Act*.
16. Dependence was placed in Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR where the Court of Appeal held that:

“Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.”
17. Equal dependence was placed in Leonard Otieno v Airtel Kenya Limited (2018) eKLR.
18. Secondly, Counsel submitted that the Court of Appeal in Islamia Madrassa Society v Zafar Niaz & 8 others [2021] eKLR affirmed that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. This was correspondingly echoed in African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor [2014] eKLR.
19. Counsel argued that the Petitioner's argument that the officials were sued on behalf of the Respondent does not suffice. First because these officials were not sued in their personal capacity and second that they cannot be sued as representatives of the Respondent as it lacks legal personality in the first place.



## Petitioner's Submissions

20. On 9<sup>th</sup> December 2023, Walela and Omariba Advocates filed submissions for the Petitioner and highlighted the key areas for discussion as: whether the Preliminary Objection raises a pure point of law and if so it has merit and whether the Respondent's officials can be sued through its registered officials.
21. On the first issue, Counsel submitted that an objection cannot be deemed to be a pure point of law if it consists of disputed facts as held in *Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937* and *B W M v J M C [2018] eKLR*.
22. Counsel argued that there is the disputed fact concerning the officials of the Respondent. Reliance was placed in *Attorney General & Anor vs Andrew Maina Githinji & Another [2016] eKLR* where it was held that:

“my understanding of the principles set forth in *Mukhisa case (supra)* is that all the three ingredients, I have identified above must be present before a preliminary Objection can be sustained. Herein only one of the three ingredients was satisfied, non- satisfaction of the other two rendered a fatal blow to the applicants amended Preliminary Objection.”
23. Comparable reliance was placed in [\*Attorney General of the Republic of Kenya vs Independent Medical Legal Unit EACJ Appeal No.1 of 2011\*](#).
24. Turning to the second issue, Counsel submitted that though Respondent cannot be sued in its own name, it can be sued through its officials. Counsel as such argued that the Respondent herein had been properly sued through its officials. Counsel noted that the Petitioner had sued the Respondent through its officials in the amended pleadings pursuant to Order 8 Rule 7 of the Civil Procedure Rules which permits amendments without leave of the Court. Counsel in light of this was certain that this Court has jurisdiction to entertain this suit.

## Analysis and Determination

25. It is my humble view that that the issues that arise for determination are:
  - i. Whether the Respondent's Preliminary Objection meets the requisite threshold.
  - ii. Whether the Preliminary Objection is merited.

## The nature of a preliminary objection.

26. The Supreme Court citing the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd (1969) EA 696* summarized the essential elements of a preliminary objection in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014) eKLR* as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696*:

“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 the contract giving rise to the suit to refer the dispute to arbitration....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”.

27. Jurisdictional questions are pure points of law. It is conferred by *the Constitution*, the Statute but may be also be circumscribed by established principles of law through judicial precedents. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR; the Supreme Court held in part as follows:

“... We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

#### **Whether this Petition offends the doctrine of Constitutional avoidance and exhaustion of remedies**

28. The doctrine of constitutional avoidance asserts that disputes that can be resolved through other legal means should be resolved as such without necessity of invoking *the Constitution* are not constitutional controversies. If therefore a matter can be resolved by application of the Statute or regulations thereof, it is not qualify a constitutional dispute or controversy.
29. Elaborating on the doctrine of constitutional avoidance, the Court in Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR held:

“17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR as follows:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

17. In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ....
18. Similarly, the same court stated in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR thus:



Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

30. Equally, in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015)eKLR the Court noted as follows:

“ 11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit* Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)....

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const(per (Georges C.J);

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

31. In *Hakizimana Abdoul Abdulkarim vs Arrow Motors (EA) Ltd & another* (2017)eKLR observed as follows:

“ 37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values...”

32. Turning to the dispute before the Court, the matter that revolves around the 1<sup>st</sup> Respondent’s elections. The 1<sup>st</sup> Respondent is regulated under the *Societies Act* as well as the 1<sup>st</sup> Respondent’s own Constitution. This Court does not see the Petition as framed forcing this Court to resort to *the Constitution* to resolve matters in dispute. The issues raised are such that they can be squared out by application of the provisions of the *Societies Act* read side by side with the 1<sup>st</sup> Respondent’s Constitution. In my very humble assessment this Petition does not therefore raise any constitutional controversy.

33. In addition, this Court has also taken note of Section 18 of the *Societies Act* which provides as follows:



Disputes as to officers

1. If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.
  2. If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.
  3. A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.
34. The Petitioner did not utilize the above procedure prior to instituting this Petition. He instead rushed to this Court with this Petition. The Petition thus offends the doctrine of exhaustion of remedies. As was held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;
- “... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”
35. In view of the foregoing, this Court upholds the Preliminary Objection and strikes this Petition with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**L N MUGAMBI**

**JUDGE**

