



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kimani v Law Society of Kenya & another (Civil Case E039 of 2025)
[2025] KEHC 7533 (KLR) (Civ) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E039 OF 2025

SN MUTUKU, J

MAY 6, 2025

BETWEEN

STEPHEN MWANGI KIMANI PLAINTIFF

AND

LAW SOCIETY OF KENYA 1ST DEFENDANT

JOSEPH KARANJA MUCHAI 2ND DEFENDANT

RULING

1. Stephen Mwangi Kimani (hereafter the Plaintiff) has instituted the suit against Law Society of Kenya and Joseph Karanja Muchai (hereafter the 1st and 2nd Defendants) by way of the Plaint dated 17.02.2025 seeking various reliefs specified in the Plaint including general damages emanating from alleged breach of his constitutional right of association, as well as costs of the suit.
2. The plaint has been filed contemporaneously with an application bearing the same date whereby the Plaintiff has sought an order for maintenance of status quo pending the hearing and determination of the suit.
3. The 1st and 2nd Defendants entered appearance and filed their joint statement of defence dated 6.03.2025 denying the key allegations made in the plaint and liability. The Defendants similarly opposed the application by way of two (2) replying affidavits separately sworn by Florence Muturi, Chief Executive Officer of the 1st Defendant, and the 2nd Defendant.

The Preliminary Objection.

4. The Defendants subsequently filed the Notice of Preliminary Objection dated 7.03.2025 challenging the competency of the suit and the application before this court, on the following grounds:



1. THAT the Supporting Affidavit and the Verifying Affidavit of the Plaintiff/ Applicant were not sworn before a commissioner of oaths and neither were they witnessed by the commissioner of oaths and this is in breach of section 4 ,5 and 8 of the [Oaths and Statutory Declarations Act](#).
2. THAT the commissioner of oaths whose stamp and signature was used, confirmed that the plaintiff/Applicant did not appear before him, he did not witness the Affidavits and that the plaintiff is unknown to him (Attached herein is an email correspondence with the commissioner of Oaths Simon Mwangi whose stamp was used)
3. THAT the action by the plaintiff is illegal as per section 7 and 11 of the Oaths and Statutory Declaration Act. Further this action renders this application incompetent and defective as it falls short of the content required under Order 51 Rule 4 of the Civil Procedure Rules. This is a mandatory requirement and without a duly filed compliant affidavit the application cannot stand.
4. THAT the minimum pecuniary limit for this honourable court is Kenya Shillings Twenty Million (Kshs.20,000,000/=) with anything less than that being a reserve of the magistrate's court pursuant to sections 7 of the Magistrates Act.
5. THAT the plaintiff has approached this court by way of a plaint and not a constitutional petition, further it is not a liquidated claim; hence the damages he is seeking can be awarded at the magistrate's court and not the High Court.
6. THAT the Applicant/Plaintiff Application and Plaint dated 17th February, 2025 is frivolous, vexatious, reprehensible, misconceived, misdirected, grossly misleading, a waste of precious and valuable judicial time and a complete abuse of the court process.
7. THAT the entire Claim by the plaintiff is an abuse of the process of this Court and ought to be dismissed with cost. (sic)

Replying Affidavit.

5. The Plaintiff has sworn a Replying Affidavit on 13.03.2025 to oppose the Preliminary Objection in which he has stated that the grounds inferring that the Verifying Affidavit as well as the Supporting Affidavit to the application were not witnessed or sworn before a Commissioner for Oaths are false, adding that the same were witnessed at the firm of Joseph N. Mbiyu & Co. Advocates and bear the valid stamp for Commissioner for Oaths, Simon Mwangi. That it is therefore fallacious that the respective affidavits contravene the provisions set out under grounds 1 to 3 of the preliminary objection.
6. Regarding grounds 4 and 5 of the preliminary objection, the Plaintiff has averred that his suit is competently before this court and that a civil claim need not be liquidated for the High Court to possess the requisite jurisdiction to entertain it. The Plaintiff has thus urged the court to dismiss the preliminary objection accordingly.

Oral Submissions.

7. The Preliminary Objection was canvassed through oral submissions. Miss Nderi, counsel for the 1st and 2nd Defendants, argued that the verifying and supporting affidavits being relied upon by the Plaintiff ought to be struck out for offending the set out legal provisions. She contended that the Applicant herein admits that he did not appear before the Commissioner for Oaths and that he instead visited



the law firm referenced hereinabove and that the Commissioner whose stamp appears in the respective affidavits does not belong to the cited law firm.

8. Counsel relied on the principles for preliminary objections, as set out in the renowned case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 and submitted that in the circumstances, the respective affidavits are defective.
9. Counsel for the Defendants further argued that the present claim ought to have been filed in the subordinate court, and that the Plaintiff has intentionally filed the same before the High Court in the hopes of obtaining a higher award. She cited the decision in *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) on matters jurisdiction and submitted that this suit is an abuse of the court process and urged the court to strike out and/or dismiss the suit with costs.
10. In opposition to the Preliminary Objection, the Applicant submitted that the grounds raised in it are unfounded. He submitted that contrary to the grounds raised, he visited the Commissioner for Oaths on the material date and that the relevant documents were properly commissioned in his presence upon payment of the requisite fees. He has argued that the Defendants are merely relying on a procedural technicality to invalidate his affidavits.
11. On the question of jurisdiction, he submitted that this court has unlimited original jurisdiction to entertain the present claim by dint of Article 165 of *the Constitution* and that the preliminary objection should be struck out.
12. In her rejoinder, Miss Nderi has submitted that this is a court of law and hence the legal procedures in place ought to strictly be adhered to.

Analysis and Determination.

13. I have considered the notice of Preliminary Objection, the reply thereto and the rival oral submissions and authorities relied upon by the parties. In my view, what presents itself as the issue arising from the arguments of the parties is whether the Preliminary Objection meets the threshold as defined in *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 which defined a Preliminary Objection in the following manner:

“....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.

14. Further, that:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”



15. The Supreme Court, in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, stated that:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

16. To my understanding, the Preliminary Objection raised in this matter rides on the issue whether the verifying and supporting affidavits by the Plaintiff comply with the relevant provisions of the [*Oaths and Statutory Declarations Act*](#). This issue is set out under grounds 1, 2 and 3 of the Preliminary Objection.
17. To determine this issue, the Court would require to enquire into whether the Verifying Affidavit and the Supporting Affidavit were sworn in accordance with the relevant legal provisions. This would require evidence to be adduced for and against that issue to enable the court to make a decision. In other words, the court would be required to delve into the facts and circumstances of the matter, in order to ascertain whether or not the Plaintiff appeared before the Commissioner and whether the stamps appearing in the respective affidavits are valid. Such an issue would not fit the definition of a Preliminary Objection. These are disputed facts. A preliminary objection cannot be raised in any fact that has to be ascertained or where what is sought is the exercise of judicial discretion.
18. The second facet of the Defendants’ preliminary objection encompasses grounds 4 and 5, and touches on the issue jurisdiction; namely whether the Plaintiff’s suit is competently before this court. The Defendants have argued that the dispute falls within the pecuniary jurisdiction of the subordinate courts and therefore ought to have been filed there. The Plaintiff on his part has maintained that the suit is properly before this court, by virtue of its unlimited original jurisdiction to entertain civil and criminal cases by dint of Article 165 of [*the Constitution*](#).
19. The legal principle is that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

20. Upon a perusal of the pleadings but without going into the merits of the dispute, it is apparent that the Plaintiff is essentially challenging the alleged malicious and misleading posting of his photograph by the Defendants, on their social media platforms, coupled with their alleged advertisement purporting that



the Plaintiff was at all material times masquerading as an advocate. The reliefs being sought therein are a declaration that the alleged postings of his images by the Defendants constitute an infringement of his constitutional right of association; general damages; compensation for use of his image for advertising; and costs of the suit.

21. From a perusal of the pleadings therefore, it is apparent that the damages sought; being in the nature of general damages; are not quantifiable at this stage.
22. From a further perusal of the pleadings, the court is of the view that the Plaintiff's claim seems to touch on elements of defamation being a civil claim, as well as constitutional rights infringements being a constitutional claim.
23. It is trite law that the High Court retains unlimited original jurisdiction to handle disputes of both a civil and criminal nature by dint of Article 165(3) of *the Constitution*. The magistrates' courts are similarly bestowed with jurisdiction to entertain both criminal and civil matters to the extent of the pecuniary jurisdiction set out under Sections 6 and 7 of the *Magistrates' Courts Act*, Cap. 10 Laws of Kenya.
24. However, Section 8 thereof grants the magistrates' courts limited power to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The same provides thus:
 - (1) Subject to Article 165(3)(b) of *the Constitution* and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
 - (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25(a) and (b) of *the Constitution*.
 - (3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights...
25. It is apparent from a general overview of the Plaintiff's pleadings that the claim in question touches inter alia, on an alleged infringement of the Plaintiff's constitutional right of association. In view of this, claims touching on constitutional violations would generally not fall within the purview of the magistrates' courts; rather, they would fall within the jurisdiction of the High Court under Article 165(3) of *the Constitution*. Consequently, grounds 4 and 5 of the Preliminary Objection equally fail.
26. Nevertheless, seeing as the Plaintiff's claim contains elements of alleged infringement of his constitutional rights which would fall under the jurisdiction of the Constitutional and Human Rights Division of the High Court as opposed to the Civil Division of the High Court, as well as elements of defamation which constitutes a civil claim, the specific cause of action being pursued here remains unclear. In the circumstances, the court is of the view that given the current state of the Plaintiff's pleadings, it is difficult to ascertain which cause of action specifically is being pursued here. There is need for clarification to be offered by the Plaintiff in respect of his pleadings.
27. In the end therefore, the notice of Preliminary Objection dated 7.03.2025 is hereby struck out, with no order as to costs. However, an order be and is hereby made directing the Plaintiff herein to amend his plaint accordingly, illuminating the relevant cause of action, if any, under which his claim lies before the Civil Division of the High Court.



28. In the event that the Plaintiff's claim lies majorly under *the Constitution* and Human Rights Division, the Plaintiff is at liberty to take appropriate action and file his claim in the right division.
29. For good order, the Plaintiff shall comply with the directions of this court within 30 days from the date of this ruling. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF MAY 2025.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Stephen Mwangi the Plaintiff/Applicant

Ms Nderi for the Defendants/Respondents

