



**Chonga & 10 others v Mulji Devraj & Brothers Limited & 6 others
(Petition 7 of 2022) [2024] KEHC 2269 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
PETITION 7 OF 2022
SM GITHINJI, J
MARCH 6, 2024**

BETWEEN

- RAYMOND CHONGA 1ST PETITIONER**
- AMANI MKENYA 2ND PETITIONER**
- ALI SAID 3RD PETITIONER**
- RIZIKI SHIKANI 4TH PETITIONER**
- ZANI JUMA 5TH PETITIONER**
- FURAHA KAHINDI 6TH PETITIONER**
- SALIM ZABLON 7TH PETITIONER**
- MIRIAM MISHI 8TH PETITIONER**
- DAVID MBERO 9TH PETITIONER**
- EMMANUEL MZUNGU 10TH PETITIONER**
- MOSES KATANA 11TH PETITIONER**

AND

- MULJI DEVRAJ & BROTHERS LIMITED 1ST RESPONDENT**
- THE BOARD OF TRUSTEES OF THE ARCHITECTS
LIMITED 2ND RESPONDENT**
- TOURISM FUND 3RD RESPONDENT**
- CABINET SECRETARY MINISTRY OF TOURISM & WILDLIFE 4TH
RESPONDENT**
- THE SPEAKER OF THE NATIONAL ASSEMBLY 5TH RESPONDENT**



RULING

- 1 For determination is the Notice of Motion dated 8th July 2022 seeking the following orders
 1. Spent.
 2. That pending the hearing and determination of this application, the court be pleased to issue an order restraining the respondents from inaugurating the operations of the Ronald Ngala Utalii College in Kilifi County.
 3. That pending the hearing and determination of this petition the court be pleased to issue an order restraining the respondents by themselves, their agents, servants and employees and/or any other person acting on their behalf and/or instruction from handing over the project to the government/public and/or for official opening and/or inaugurating its operations.
 4. That the costs of this application be provided for.
- 2 The application is founded on the grounds set out on its face and the Supporting affidavit of Raymond Chonga the 1st Petitioner who deponed that it is in public knowledge that the project (Utalii Project) was initially budgeted for Kshs. 2 billion but the same was suspiciously varied to Kshs. 9 Billion. That since the award of the tender there has been several variations of the same which had the effects of opening loopholes for siphoning of public funds occasioning massive theft of funds. It was further stated the respondents have been varying the project sum without consultation and/or cabinet approval as is required of such projects.
- 3 It was stated that the Kenya National Assembly Public Investments Committee in their special report on the implementation of the Tourism funds, on Ronald Ngala Utalii College made the following observations as summarized;
 - a. That no feasibility study was undertaken before implementation of the project.
 - b. That the establishment of the project had no legal backing.
 - c. That the project was established through a cabinet memorandum at a cost of Kshs. 1.95 Billion and there was no evidence of another memo escalating the cost to Kshs. 8.9 Billion. Further, there was no evidence of cabinet endorsement of the variation of Kshs. 4.9 Billion.
 - d. That there is no assurance that the project will be completed within the budget considering the amounts already paid.
- 4 It was further stated that subsequently, the committee made recommendations as set out under paragraph 7 of the supporting affidavit which recommendations have not been implemented. It was additionally stated that from the reports by the Public investments and the Auditor General it is quite clear that there was systematic and organized plan to steal public funds through the suspicious varying of the project cost. That the petitioners and the greater public will suffer great loss should the project be officially inaugurated before public funds is properly accounted for.
- 5 The 1st Respondent filed a Notice of Preliminary Objection dated 2nd February 2023 based on the following grounds;



- a. The petitioners have no locus standi to institute and/or prosecute this petition as against the 1st Respondent either on their own behalf or on behalf of the members of the public.
 - b. The 1st respondent is wrongfully sued since there is no claim against it. There is no contractual relationship between the 1st Respondent and the Petitioners.
 - c. The petition herein is therefore an abuse of the court process and should be dismissed with costs to the 1st respondent.
- 6 The 1st respondent also filed a replying affidavit of even date reiterating the contents of the Preliminary Objection and added that the 1st Respondent was contracted by the 3rd Respondent through a competitive tender process that was carried out through an open tender method. In addition, the works on the college was carried out in an open and transparent manner thus no public funds went into waste as alleged by the petitioners.
- 7 The 5th and 6th Respondents filed a replying affidavit sworn by Mr. Samuel Njoroge the clerk of the National Assembly stating that the Petitioners' contention arises out of the procurement, financing and implementation of the Utalii project wherein the petitioners allege contravention of principles of public Finance. Further, the replying affidavit sets to respond on the issues raised in the petition and not the Application herein.

Analysis and Determination

- 8 The application was canvassed by way of written submissions. I have looked at the petitioners' submissions and save for the issue of locus standi discussed therein, the submissions delve into the merits of the petition and thus is of no probative value at this stage. I have equally considered the submissions by the 1st respondent and the same address the Preliminary Objection by the 1st Respondent. That said, I find the following issues for determination; whether the Preliminary Objection is merited and the orders for injunction as sought in the application.
- 9 It is now settled 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, will dispose of the suit. See *Mukisa Biscuits Manufacturing Company Limited -v- West End Distributors (1969) EA 696*. In *Oraro v Mbaja [2005] eKLR* the court stated that: -

“A Preliminary Objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence.”

- 9 So now, I weigh the objection raised by the 1st Respondent vis-à-vis the above stated rules on preliminary objection. The 1st respondent's Preliminary Objection is based on locus standi and that the petition does not disclose a cause of action against the 1st respondent. The issue of locus standi is a point of law which I am under the obligation to determine first before any other. In the case of *Law Society of Kenya V Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000*, it was stated as follows: -

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.



10 Further in the case of Alfred Njau and Others -Vs- City Council of Nairobi [1982] KAR 229, the Court also held that: -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

11 Therefore, locus standi means the right to appear before, and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard for he is a stranger to the suit. Locus standi is so important that in its absence, party has no basis to claim for anything before the Court.

12 The petitioners have instituted this suit vide the petition on their behalf in their capacity as residents of Kilifi County and on behalf of the residents of Kilifi County. This is therefore a public interest litigation. Article 258 of *the Constitution* entitles every person the right to institute court proceedings claiming that *the constitution* has been contravened, or is threatened with contravention. Therefore, persons with or without direct interest in a matter are allowed to approach the courts. I am therefore of the considered view that the petitioners herein have the capacity to institute the petition.

13 On the second aspect, the preliminary objection regards non-disclosure of cause of action against the 1st Respondent, I find that the same is argumentative and does not raise a pure point of law. It calls for evidence to determine the same on merit and cannot be summarily dismissed as anticipated by the objective of a preliminary objection.

14 Now onto the merit of the application, the orders sought by the petitioners in the instant application are injunctive in nature seeking to restrain the respondent either by themselves or their agents from handing over the project to the government/public and/or inaugurating its operations.

15 The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

- a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

16 The conditions for consideration in granting an injunction were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [Supra] where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of



damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

- 17 The Court of Appeal in the case of *Nguruman Limited -v- Jan Bonde Nielsen & 2 others* [2014] eKLR further opined that:

"...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

- 18 The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction.

- 19 The Court of Appeal in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, (2014) eKLR, defined a prima facie case as follows;

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

- 20 From the above definition, it is clear that a prima facie case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial. Have the petitioners therefore demonstrated this?

- 21 From the supporting affidavit by the 1st Petitioner, the injunction sought rests on the allegation of flawed process of procurement, financing and implementation of the Utalii project. The Petitioners' case is that the budget was suspiciously varied to Kshs. 8.9 billion from Kshs.1.95 billion. Further that there is no accountability in the process. The orders sought by the petitioners herein in my view if granted could as well dispose the entire petition and prematurely. Money has already been used in the project and by the 1st Petitioner admission, some progress has been made on the project. Even from the injunctive prayer that aims at stopping the inauguration, one can safely infer that the project is at an advanced stage and stopping its handover and/or inauguration would not address or resolve the disputed issues and in my view, would be adverse to public interest and benefit in the project. Thus, I find that the Petitioners have not established a prima facie case that warrant the orders sought. In any case, the balance of convenience favors the respondents in consideration of the community set to benefit.

- 22 Having established that the Petitioners have not established a prima facie case, I need not delve into the two other pillars. This was well settled in *Nguruman Limited -v- Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal restated the law as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;



- a. establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to
- (d) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. ... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration." (emphasis mine)

Flowing from the foregoing, I make the following orders;

1. That the Preliminary Objection dated 2nd February 2023 be and is hereby dismissed for lack of merit.
2. The Notice of motion dated 22nd July 2022 be and is hereby dismissed for lack of merit.
3. No orders as to cost.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6TH DAY OF MARCH, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Akama holding brief for Mr Mwendwa for 5th and 6th Respondents.

Other parties absent. They be notified.

Ms Akama; - We pray for Notice to Show Cause to issue why the Petition should not be dismissed.

Court; - Notice to Show Cause to issue to the Petitioner. Mention on 9/4/2024.

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S.M. GITHINJI

JUDGE

6/3/2024

