



**Muriuki v Kiptess, Police Constable at Kiirua Police Station & 3 others
(Petition E003 of 2021) [2024] KEHC 4892 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E003 OF 2021
EM MURIITHI, J
APRIL 18, 2024**

BETWEEN

LIVINGSTONE MURIUKI PETITIONER

AND

**KIPKETCH KIPTESS, POLICE CONSTABLE AT KIIRUA POLICE
STATION 1ST RESPONDENT
KYALLO OF KIIRUA POLICE STATION 2ND RESPONDENT
MATANO OF KIIRUA POLICE STATION 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The Petitioner filed a Notice of Preliminary Objection on 14/11/2023 raising 2 grounds that:
 1. No third-party notice can be raised in a claim for violation of constitutional rights by a specific person.
 2. The actions of the 1st, 2nd and 3rd respondents border criminal activities from which no contribution or indemnity can be pleaded.

Submissions

2. The Petitioner urges that there is no factual dispute that the 1st – 3rd Respondents mercilessly beat and injured him during the alleged arrest, and the intended 3rd party has not been said to have aided the police in beating him up. He urges that the acts of violations of human rights and freedoms by the police cannot be transferred to the intended 3rd party, and cites *Socfinaf Kenya Ltd v Peter Guchu Kuria* (2002) eKLR where Aganyanya J held that, “When there is a case of suspected theft, the first step is to report the matter to the police who, in their own way find out how to carry out investigations.



And it is up to the Police to take further steps like taking a suspect to Court if they have sufficient evidence against such suspect to warrant such action. This then is the action by the Police and the state should be involved or joined in such suit and that the complainant should not be blamed for making such report to police.....” He urges that the duty and mandate to conduct investigations, make arrests, where necessary, and within the legal confines fell within the state and the 1st – 3rd Respondents were the state agents. He urges that the 3rd party notice as issued is unmerited and ought to be struck out with costs, and cites *Mukbisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.

3. The Respondents urge that the preliminary objection has no merits as it is based on unascertained facts rather than pure points of law, and cite the Supreme Court case of *Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others* (2014) eKLR, the Supreme Court case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* (2015) eKLR, *Law Society of Kenya v Cabinet Secretary for Health & 6 Others* HC Pet No. 78 of 2020, *Kitty Njiru v Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kabaari (Proposed third Party)* [2020] eKLR and *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling). They submit that the participation of the 3rd party in this suit is essential as it facilitates a thorough examination of the history of the claim and the events of the relevant evening. They urge that the Respondents, acting on the 3rd party’s complaint proceeded to the crime scene and arrested the Petitioner in accordance with their mandate per the *National Police Act*, and the due process of law. They urge that the assessment of whether the impugned actions actually transpired and constitute criminal conduct involves questions of fact and law which cannot be determined in the preliminary stage of this suit, but can only be resolved upon the matter being heard on merit.
4. The intended 3rd party urges that it is the sole responsibility of the Respondents to carry out investigations and it is evident that the Petitioner’s complaint is against the Respondents. She urges the court to confirm whether what is before it is indeed a preliminary point of law that would properly be determined as a preliminary objection, and cites *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) E.A 696, *Attorney General & Anor v Andrew Mwaura Gitthinji & Anor* (2016) eKLR and *Oraro v Mbaja* (2005) eKLR. She submits that the preliminary objection is meritorious as the provisions of Order 1 Rule 15 of the *Civil Procedure Rules* have been contravened, and urges the court to allow it with costs.

Analysis and Determination

5. The issue for determination is whether the preliminary objection has been properly raised.
6. What properly constitutes a preliminary objection has been defined times over including in the locus classicus case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 as follows:-

“ 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.”

7. This court in Meru Succession Cause No. 26/1988 *In the Matter of the Estate of Thomas Mbui Njenge Alias Thomas Nchenge (Deceased)* David Mbuko T. Mbui v Susan Gacheri Vol. 8 NO. 62 held that:

“In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. Although parties did not address the Court on the import and tenor of a preliminary objection, this Court finds this to be an important matter which has the potential of either granting or divesting this Court with jurisdiction



to entertain the preliminary object which forms the subject of this Ruling. This Court cannot overlook the question of jurisdiction, even with respect to entertain the preliminary objection. Should this Court find that there any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.”

8. Again in *Shivji Jadva Parbat & 2 others v Attorney General & 2 others* [2017] eKLR this court held that,

“It is clear that the police have general powers of investigation of crime under Article 245 (4) (a) of the *Constitution* and the DPP a general power to prosecute offenders subject only to the *Constitution* and the requirements of public interest under Article 157 (11) of the *Constitution*.”

9. In this case, it has been pleaded that the complainant made a report of destruction to property against the Petitioner to the police. The police proceeded to the Petitioner’s home where they beat him using handcuffs, kicks, slaps and blows before his subsequent arrest and unlawful detention at Kiirua police station.

10. The Respondents have now issued a third party notice against the complainant for allegedly giving them misleading information which led to the unlawful arrest and detention of the Petitioner. The Petitioner properly raises the Preliminary Objection on the basis that the facts pleaded in the third party notice are correct.

11. In *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR, the court (R. Nyakundi J) rendered thus,

“It is noteworthy that the existence of the power to arrest is one thing. The justification for the exercise of it is quite another thing...Thus it is incumbent upon those who deprive other persons of liberty in the discharge of what they conceive to be their duty to strictly and scrupulously observe the forms and rules of law. I’m also tempted to mention that no arrest should be made by Police Officer without a reasonable satisfaction reached after some investigation as to the genuines and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest.”

12. When the 1st – 3rd Respondents received the report from the complainant against the Petitioner, it behooved them to carry out thorough investigations which would guide the decision to be taken thereafter. It was only after collection and collation of sufficient evidence against the Petitioner that they would be justified in arresting and charging him. It does appear that the act of beating and assaulting the Petitioner was perpetuated solely by the police without any legal justification, and the complainant cannot, therefore, be required to indemnify the Respondents for their own deliberate acts and/or omissions. The police cannot rely on an assumed command theory to bring the tortious and criminal acts of the police to the door of the complainant who made a report to the police.

13. If the complainant made an unjustified complaints, he may be charged with giving false information. Not a civil liability for filing a complaint, unless it be a claim for false arrest and or malicious prosecution where her act of initiating, arresting and prosecuting, if she be so involved, on false and malicious information may give rise to joint liability with the prosecution for malicious prosecution and or false arrest.



14. No report by a complainant would justify or explain assault by police at the time of arrest. The complainant made a report to the police, but it is the police who in executing arrest may have assaulted the Petitioner. The complainant had no control over the police action subsequent to making the complaint. It would be stretching the law of responsibility and contribution too far to rope in a complainant in a criminal complaint to subsequent action by the police, during or after investigations, for which they are sued for breach of constitutional, statutory or civil wrong.
15. Moreover, in criminal law which is the substantive law on the acts subject of this constitutional petition, unless a person has participated in some way in the common intention to commit the offence or was an aider or abettor in which case he would be charged as a principal offender or for aiding and abetting, there is no basis for civil liability by way of third party notice in a criminal act. If the complainant participated or contributed to the crime in any way, she should have been so charged.

ORDERS

16. Accordingly, for the reasons set out above, this court finds merit in the Petitioner's Preliminary Objection dated 12/11/2023 and, consequently, makes the following orders:
 1. The Third Party notice dated 18/5/2023 is hereby struck out.
 2. The Respondents will pay the costs of the application and the Preliminary Objection to the Petitioner and the intended 3rd party.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Ms. Ngunjiri Michael & Co. Advocates for the Petitioner

Ms. MD Maranya & Co. Advocates for the Intended 3rd Party

Mr. Nguyo Wachira for the Respondent

