



Kariuki & another v Gitau & another; Registrar of Societies & another (Interested Parties) (Civil Case E023 of 2023) [2024] KEHC 7110 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E023 OF 2023
HM NYAGA, J
JUNE 12, 2024**

BETWEEN

GEORGE KIMANI KARIUKI 1ST PLAINTIFF

CHARLES GACHERU GATHAGA (SUING ON THEIR BEHALF OF THE 188 MEMBERS OF TIMBER MANUFACTURES ASSOCIATION) 2ND PLAINTIFF

AND

BERNARD GITAU 1ST DEFENDANT

JOHN WAKABA 2ND DEFENDANT

AND

REGISTRAR OF SOCIETIES INTERESTED PARTY

OFFICE OF THE ATTORNEY GENERAL INTERESTED PARTY

RULING

1. The Applicants commenced this suit via a plaint dated 18th December,2023 praying for Judgement against the Defendants/Respondents herein jointly and severally for: -
 - a. An Order of Permanent Injunction restraining the Defendants from purporting to be office bearers or laying claim to the assets and interests of TIMBER MANUFACTURES ASSOCIATION.
 - b. An order for the Defendants be suspended from the Association.
 - c. That Defendants be ordered to avail and/or to render accounts of the Association from 2008.
 - d. That in the alternative, the Defendants be ordered to pay a surcharge and/or refund in respect of all the funds spent while illegally in office.



- e. That this Honourable Court adopts the lists of registered and paid up members on record herein as the legitimate list of members of TIMBER MANUFACTURES ASSOCIATION.
 - f. That an order directing individuals present in the list of registered and paid up members of TIMBER MANUFACTURES ASSOCIATION herein to form a caretaker/interim Committee to handle any and all matters in relation to the TIMBER MANUFACTURES ASSOCIATION and the transition therein.
 - g. That an order directing the 1st Interested party to timeously convene a meeting for TIMBER MANUFACTURES ASSOCIATION for the election of office bearers supervised by the Caretaker/Interim Committee herein.
 - h. Costs and interest of this suit.
2. Contemporaneously with the Plaint, the Applicants filed this Notice of Motion dated 18th December, 2023 brought under Sections 1A, 1B, 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010, Articles 22,33,35,47 and 159 of the Constitution seeking for ORDERS: -
- a. Spent
 - b. That pending the hearing and determination of this Application interpartes, a temporary injunction do issue restraining the Defendants/Respondents from purporting to be office bearers or laying claim to the assets and interests of the Association.
 - c. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendants/Respondents from purporting to be office bearers or laying claim to the assets and interest of the Association.
 - d. That pending the hearing and determination of the suit herein, the Defendants/Respondents be suspended from the Association.
 - e. That pending the hearing and determination of the Application interpartes, the Defendants/ Respondents be ordered to avail and/r to render account from 2008, the purported year they were elected in.
 - f. That in the alternative, the Defendants be ordered to pay a surcharge and/or refund in respect of all the funds spent while illegally in office.
 - g. That this Honourable Court adopts the list of registered and paid up members on record herein as the legitimate list of members of TIMBER MANUFACTURES ASSOCIATION.
 - h. That an Order directing individuals present in the list of registered and paid up members of TIMBER MANUFACTURES ASSOCIATION herein to form a caretaker/interim Committee to handle any and all matters in relation to the TIMBER MANUFACTURES ASSOCIATION and the transition therein.
 - i. That an Order directing the 1st interested party to timeously convene a meeting for TIMBER MANUFACTURES ASSOCIATION for the election of office bearers supervised by the Caretaker/interim Committee herein.
 - j. That costs of this Application be provided for.
3. The Application is supported by grounds on its face and an affidavit of George Kimani Kariuki sworn on his behalf and on behalf of the 2nd Applicant and the members of TIMBER MANUFACTURES ASSOCIATION on 18th December, 2023.



4. In a nutshell, the Applicants' case is that TIMBER MANUFACTURES ASSOCIATION is a commercial Organization of timber manufactures which works under the province of the Kenya Forest Service to extract forest produce with a commercial cumulative value of approximately One hundred Million borne of licences and asset base of each registered member.
5. That on or about 2008, the last election of the leadership of the association herein was conducted and the Respondents were elected. However, the election was not ratified by the 1st interested party herein rendering an election of that date a nullity.
6. They depone that subsequently, there has been a vacancy in office since then thus annual returns and statutory compliances have never met as required.
7. That due to the unavailability of the treasurer and non-existent bank account for the subject association, all pointing to the poor management of the association herein by the defendant/respondents, members present passed a resolution for the aforementioned registration and annual subscription fees to be channelled to the 2nd plaintiff/applicant herein who would hold it in trust pending the election of the office bearers on 15th December, 2023 where the 2nd plaintiff/applicant would remit the same to the incoming treasurer who would deposit the same to a bank account specifically for the association herein.
8. They assert that the 2nd respondent without consultation or proper explanation to the members issued a notice on 27th November, 2023 in the local daily postponing the subject annual general meeting slated for 15th December, 2023.
9. They accused the respondents for failing to render accounts to the association and continuing to retain its seal, books of accounts and other related statutory instruments.
10. They believe the association risks getting deregistered by the 1st interested party herein to the detriment of all the bona fide members since the Annual returns have not been filed and elections of office bearers and committee members not conducted for the past decade.
11. They aver that further the respondents have instituted an incompetent suit before the lower court vide NAKURU CMCC NO. E752 of 2013 whereby they extracted and served them with an erroneous mention date of 22nd December, 2023 instead of 31st January 2023 purposefully to extract benefit from the stalemate therein, and that their efforts to put the association's house in order are presently threatened by the defendants/respondents.
12. That owing to the foregoing, the defendant/respondents have converted themselves into a conduit and intermediary to extort the organization while depleting its resources.
13. They contend that they face the risk of being left out in all the commercially viable activities available specifically from Kenya Forest Service in respect to sustainable forest management which the association is best suited in executing.
14. In response to the Application, the Respondents filed a Preliminary Objection (P.O) dated 11th March, 2024 raising the following grounds: -
 - a. That there is pending in court Nakuru CMCC No. E752 of 2023 relating to the same parties and subject matter.
 - b. That the Honourable Court in the said matter has issued orders of injunction restraining the plaintiffs herein from in any way interfering with the affairs of TIMBER MANUFACTURES ASSOCIATION and which orders are still in force.



- c. That thus the instant suit and application is sub judice and cannot be entertained by the Honourable Court.
 - d. That the Orders sought are superfluous and cannot be granted.
15. The Respondents also filed grounds of objection dated 11th March 2024 on grounds that: -
- a. The entire application and suit is incompetent, redundant and a gross abuse of the court process.
 - b. That there is pending in court NAKURU CMCC NO. E752 of 2023 relating to the same parties and subject matter and first in time.
 - c. That the Honourable Court in the said matter issued orders of injunction on 14th December,2023 restraining the plaintiffs herein from in any way interfering with the affairs of TIMBER MANUFACTURES ASSOCIATION and which orders are still in force.
 - d. That the instant suit and application is thus sub judice and the orders sought are incapable of being granted.
 - e. That the Application and suit are totally unmerited and mala fides.
16. On 20th March, 2024, parties took direction for disposal of the preliminary objection first through written submissions.

Applicants' Submissions

17. On whether the P.O is justified, the Applicants' Counsel submitted that the matter herein is not sub judice for reasons that: -The Parties herein and those in NAKURU CMCC NO. E752 OF 2023 are substantially not the same since the applicants herein vide resolution pursuant to Order 1 Rule 1 Rule 13(1) and (2) of the Civil Procedure Rules have a written authority to appear, plead or act on behalf of members of the subject association while the Respondents herein in NAKURU CMCC NO. E752 OF 2023 appear in person and that additionally the Registrar of Societies and the office of the Attorney General who are also are parties in the instant suit have not been enjoined in NAKURU CMCC NO. E752 OF 2023.The subject matter in the two suits are relatively different since in the lower matter, the respondents therein were solely interested in barring the conduct of the elections of office bearers of the subject association which was supposed to be done on 15th December,2023 while the subject matter herein is focused on ensuring compliance with the Association's Constitution, restoring accountability of the association's rank and file and foster the continuity and optimum functionality of the Association.
18. The Applicants' counsel thus urged this court to dismiss the P.O. In support of their submissions reliance was placed on the cases of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696; Bashir Haji Abdullahi vs Adan Mohammed Nooru & 3 Others (2004) eKLR; Heritage Insurance Company Ltd vs Patrick Kasina Kisilu (2015) eKLR; & Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 Others [2012] eKLR.

Respondent's Submissions

19. As to what constitutes a P.O, the Respondent's counsel cited the cases of Montessori Learning Centre (MLC) v Kimani Mathu, Chairman & 2 others; National Environment Management Authority & 2 others (Interested Parties) [2022] eKLR & Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd(Supra).



20. The Counsel then submitted that a closer look at the paragraph 18 of the 1st and 2nd Applicant's herein plaint dated 18th December, 2023 and the 1st Plaintiff's supporting affidavit in regards to application dated 18th December, 2023, both plaintiffs acknowledge the existence of NAKURU CMCC NO. E752 OF 2023.
21. The counsel posited that both in the instant suit and the lower court suit pertain to the same subject matter concerning the affairs of TIMBER MANUFACTURES ASSOCIATION as clearly indicated in the Orders issued on 14th December, 2023 where the plaintiffs in the instant suit were restrained from interfering with the affairs of TIMBER MANUFACTURES ASSOCIATION.
22. The counsel argued that the said orders have never been vacated or reviewed and or set aside and consequently the instant application contravenes Section 6 of the Civil Procedure Act.
23. The Respondent's counsel prayed that this court be guided by the decision in David Kiptoo Cheluget vs Abraham Kipruto Cheluget & 3 Others [2021] eKLR and to dismiss this suit.

Analysis & Determination

24. I have considered the application, the affidavit in support of the application, the preliminary objection, the grounds of opposition and the rival submissions filed.
25. In my view, the Main issue that arises for determination is whether this suit is sub-judice Nakuru CMCC No. E752 of 2023.
26. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd (supra) was stated to be thus:-

“So far as I am aware, 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.”
27. Oraro vs Mbaja 2005 1 KLR 141 the court said:

“A ‘Preliminary Objection’, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
28. In Avtar Singh Bhamra & Another vs. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004, the Court held that:

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
29. Preliminary Objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should be purely on a point of law not on facts which are yet to be verified.



30. Section 6 of the *Civil Procedure Act* provides as follows:

‘No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.’

31. In *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR the court held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

32. It is my considered view that the question of whether a suit is sub judice is a matter of law, which if argued as a preliminary point may dispose of the suit. It is thus a valid point to raise as a preliminary objection.

33. In *ATC Kenya Operations Limited vs Telkom Kenya Limited (Environment and Land Case Civil Suit E157 of 2023)* [2023] KEELC 18872 (KLR) (13 July 2023) (Ruling) the court opined as follows:-

“Sub – judice, is a pure point of law as it goes to the jurisdiction of the Court. Sub judice only applies when another suit or proceedings is pending in another court involving the same parties over the same subject matter.”

34. Before the lower court, the Respondents herein vide a plaint dated 13th December,2023 sued the Applicants praying for judgement to be entered against them jointly and severally for:-

- a. An Order of permanent injunction restraining the defendants by themselves, their servants, agents, proxies and/or persons exercising authority from them from calling any other meeting and or interfering with the affairs of the TIMBER MANUFACTURES ASSOCIATION.
- b. Costs of the suit and interest.
- c. Any other further relief that this Honourable Court may deem fit and just to grant.

35. They pleaded that on 22nd November,2023 a notice was put up in the local daily calling members of the Timber Manufacturers Association for an Annual General Meeting which was scheduled to be held on 15th December,2023 and on 27th November,2023 another notice was published in the local daily postponing the aforesaid meeting.

36. They averred that after postponement of the meeting of 15th December 2023, the Applicants herein went ahead and made another undated and unsigned notice stating that the postponed meeting shall proceed and the agenda is election.

37. They contended that the said meeting was not scheduled as provided for under Article 8(b) (i) of the Association’s constitution and rules adopted on 27th July, 1981, and as such the meeting is illegal.



38. They also stated that the applicants herein are strangers and their sole intention is to illegally interfere with the affairs of the Association.
39. Contemporaneously with the plaint, the respondents herein equally filed a notice of motion dated 13th December 2023 principally seeking an order for a temporary injunction restraining the Applicants herein by themselves, their servants, agents, proxies and or person exercising authority from them from interfering with the affairs of Timber Manufactures Association and holding a meeting that was slated for 15th December, 2023 and or calling for any such other such meeting.
40. On 14th December, 2023, the lower court issued interlocutory temporary injunction sought. This order is still in force.
41. In response to the application in the lower court, the applicants herein filed a notice of preliminary objection dated 18th December, 2023 praying for the said application to be dismissed in limine for reasons that Respondents herein lack locus standi to institute the same, the respondents have irregularly assumed office despite lapse of their tenure; the respondents lack capacity to sue on behalf of Timber Manufactures Association due to lack of resolution authorizing them to act ; and that their advocates are improperly on record due to lack of consent and authority to act from the members of the association vide proper and direct resolutions.
42. It is clear that the issues raised in the lower court mainly touch on the intended meeting that was to be convened and the alleged interference of the affairs of the Association by the applicants herein. The suit in the lower court will involve a determination of who are the legitimate officials of the Association.
43. From the outset, it is doubtful if the Magistrates Court has the jurisdiction to entertain the dispute in the first place. Although this does not appear to have been raised by the parties a question of jurisdiction is so fundamental that it has to be addressed as a prerequisite to entertaining the suit.
44. It is evident that the Association in question is duly registered under the [Societies Act](#). Section 18 thereof provides for dispute resolution among members of a society . It states as follows;

“ 18. 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.”



45. Therefore, if the lower court had no jurisdiction, then the question of sub judice does not arise at all.
46. It may be that I am wrong on the issue of jurisdiction, so I will also look at the question as to whether the present suit can be held to be sub judice the earlier suit in the magistrates court.
47. In the suit before this court, the applicants are said to be acting on their behalf and on behalf of 188 other members who are not parties in the suit in the lower court. They have also brought in two interested parties, who are not parties in the earlier suit. The suit also involves a determination as to the legality of the respondents to be in office, having allegedly flouted the Association's constitution and the provisions of the *Societies Act*.
48. The test for whether a matter is sub judice is whether on a final decision being reached in the previously instituted suit, such decision would operate as res judicata in the subsequent suit (see Republic vs Paul Kihara Kariuki and 2 others Ex-parte The Law Society of Kenya 2020 eKLR).
49. From the pleadings, the suit in the lower court involves only some of the parties herein, namely the two respondents and the two applicants said to act on behalf of 188 others in this suit.
50. I am of the view that even though the applicants and respondents in the former suit are in this suit, there are other parties herein who by virtue of having authorised the applicants to file this suit are not parties in the former suit. As such, if this suit is found to be sub judice, then these parties will be left in the cold.
51. The next question that arises then is whether a determination of the suit in the lower court would substantially determine all the issues herein.
52. In my view, although the lower court would be addressing a question of whether the meeting called by the respondents therein was lawful or not, the farthest it could go, from the pleadings filed therein, if the suit is successfully prosecuted, is to issue a permanent injunction against the two respondents therein. Would that injunction then apply to the rest of the applicants and the interested parties herein? Would it bar the applicants from pursuing their right of redress if they feel that they need to?
53. My simple answer to the questions above is in the negative. Although the two courts may be called to look at some similar issues in both cases, the determination of the former suit will not resolve all the substantial issues raised in the subsequent suit.
54. For the above reasons, it is not appropriate to find the instant suit is sub judice Nakuru Civil Suit No. E 752 of 2023.
55. In view of the above, I am of the view that magistrates court had no jurisdiction to entertain the dispute before it.
56. I am also of the view that prior to coming to this court, the dispute ought to have first been handled by the Registrar of Societies, who the law mandates the authority to act as set out.
57. Therefore, I find that the right forum for now at this stage would be the said office. Thus, the suit in the lower court ought not to have been filed there in the first place. Since the parties have not had a chance to address me on the same, instead of quashing the proceedings in that suit, I will order a stay of the same pending further directions.
58. For the foregoing reasons and in exercise of the jurisdiction conferred by this court under Article 165 (6) and (7) of *the Constitution*, I order that the proceedings before the subordinate court be stayed.



59. Further these proceedings are also stayed and the matter is referred to the Registrar to act under section 18 of the Act.
60. In a nutshell, I find that the Notice of Preliminary Objection cannot succeed. It is dismissed with no orders as to costs.
61. In conclusion, I make the following orders;
- a. CMCC No. E 752 of 2023, is hereby stayed.
 - b. This suit is also stayed.
 - c. The dispute is referred to the Registrar to act as provided under the *Societies Act*.
 - d. The Registrar is to file a report of his/her determination within 30 days from the date of this ruling.
 - e. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 12TH DAY OF JUNE, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Wanjiru for Mwangi for 1st and 2nd Defendants

Mr. Kimaru for Plaintiffs/Applicants

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