



**Awino & 7 others v Inspector General of Police & 3 others (Petition 250 of 2019)
[2024] KEHC 8623 (KLR) (Constitutional and Human Rights) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8623 (KLR)

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

PETITION 250 OF 2019

LN MUGAMBI, J

JULY 18, 2024

BETWEEN

**JULIANA OLAYO AWINO 1ST PETITIONER
PATRICK OROKO ONSEMBI 2ND PETITIONER
WINNIE OBURE AKOTH 3RD PETITIONER
ANTONIA ROSE ATIENO 4TH PETITIONER
ESTHER KERUBO NYAMWEYA 5TH PETITIONER
DOREEN AWUOR OKONGO 6TH PETITIONER
PAMELA ADHIAMBO WASUDA 7TH PETITIONER
MARGARET MORAA MWANBA 8TH PETITIONER**

AND

**INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
SAFARICOM LIMITED 4TH RESPONDENT**



RULING

Introduction

1. The Petition dated 20th June 2019 evolved from the 1st Respondent's failure to release the Petitioners' police cash bail of Kshs 40,000 that they had paid on 13th December 2016 to the OCS at Shauri Moyo Police Station. Subsequent to their Court appearance, the Magistrate had ordered that the posted police cash bail be converted into court cash bail to secure their release after being charged.
2. The 1st Respondent indicated that the conversion was not possible due to the failure of the 4th Respondent's Mpesa system that was being used by the police.
3. Aggrieved by the 1st Respondent's failure to return the monies and the system failure on the part of the 4th Respondent, the Petitioners filed the instant suit alleging violation of their constitutional rights.
4. The he 4th Respondent's protested there was no reasonable cause of action disclosed to make it a Party in the instant Petition hence filed the instant Notice of Preliminary Objection seeking to be struck off from these proceedings.

4th Respondent's Preliminary Objection

5. The 4th Respondent in its Notice of Preliminary Objection dated 1st February 2022 objects the Petition on the following grounds:
 - i. The Petition discloses no cause of action as against the 4th Respondent.
 - ii. The Petition dated 20th June 2019 should be dismissed against the 4th Respondent.

Petitioners Response

6. In reply to the objection, the Petitioners filed their grounds of opposition dated 2nd June 2023 on the basis that:
 - i. The Application is devoid of merit and afterthought by the Respondents.
 - ii. The preliminary objection discloses no arguable points of law and it is otherwise scandalous, frivolous and is well calculated to embarrass or delay the fair trial of this matter.
 - iii. The 4th Respondent is an indispensable party to these proceedings as its Mpesa platform was used by the 1st and 2nd Respondents to receive money from the Petitioners and whose platform collapsed before the money was returned to the Petitioners.
 - iv. This Court is being invited to hear the Petition without the participation of a party that is likely to be affected by its final orders.
 - v. One of the issues raised in the Petition relates to money held by the 1st and 2nd Respondents after the Mpesa platform of the 4th Respondent collapsed before giving back the money to the Petitioners.
 - vi. That the Application is a blatant abuse of the Court process aimed at stalling the course of justice and should be dismissed with costs.



1st, 2nd and 3rd Respondents' Response

7. These Parties responses and submissions to the preliminary objection are not in the Court file or Court Online Platform (CTS).

4th Respondent's Submissions

8. In support of its preliminary objection, the 4th Respondent through Gikera and Vadgama Advocates filed submissions dated 19th June 2023. Counsel submitted that the Petition does not disclose any cause of action against the 4th Respondent.
9. Counsel stated that contrary to the 1st Respondent claim, all pay bills are configured by business owners and not the 4th Respondent. It was stated that it is the business owners who have control over the credentials to allow transfer of funds from the Pay Bill account to a bank account. Moreover, that the 4th Respondent cannot complete transfer any funds in a Pay Bill account without the consent of the pay bill account holder. Further, once the monies are transferred to a bank account, the 4th Respondent does not have any information regarding the same and that the system does not allow for remittance to mobile phone numbers.
10. It was submitted that the 1st Respondent's Pay Bill Number 811555 received the alleged police cash bail which was thereafter transferred to the National Police Service Bank account under the name 'State Department'. It was revealed that this Pay Bill Number was subsequently suspended following a request made by the National Police Service on 1st July 2020 and has been inactive ever since.
11. Counsel asserted that this Court has power to strike out a Petition as against a party if the pleadings do not disclose any reasonable cause of action against such a party. The proponent of the preliminary objection placed reliance on *DT Dobie & Company (K) LTD v Muchina* (1982) KLR where the Court of Appeal held that:

“a reasonable cause of action is one with some chances of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.”
12. Reliance was also placed on *Investments and Mortgages Bank Limited v Nancy Thumari and 3 others* (2015) eKLR.
13. Counsel argued that the Petitioners have not disclosed any constitutional violation or cause of action against the 4th Respondent as none of the reliefs sought by the Petitioners was against the 4th Respondent. As such, it was argued that it was improper of the Petitioners to join the 4th Respondent in this suit.
14. In addition, the claim of system failure was not supported by any evidence. Reliance was placed in *Kipkepe Limited v Peterson Ondieki Tai* (2016) eKLR where it was stated that:

“It is trite law in evidence that he who asserts must prove. No evidence was adduced by the plaintiff. In such cases the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.”
15. For this reason, the 4th Respondent urged the Court to strike out its name from the Petition as it had been wrongly enjoined in the suit with no reasonable cause of action having been pleaded against it and no evidence to demonstrate to establish any liability on the part of the 4th Respondent.



Petitioners Submissions

16. The Petitioners' submissions to the preliminary objection are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

17. It is my considered view that the issues that arise for determination are:
- i. Whether the Notice of Preliminary Objection dated 1st February 2022 meets the legal threshold of a preliminary objection.
 - ii. Whether the preliminary objection is merited.
18. The locus classicus case in which the threshold for preliminary objection was laid out is the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. The principles were reaffirmed by the Supreme Court in the *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* (2014) eKLR as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v 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”.

19. On the same breath, in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR, the Court held thus:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

20. These principles were also applied by the Court in *Oraro v Mbaja* [2005] 1 KLR which stated thus:

“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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

21. A preliminary objection is based only on pure questions of law. It is argued on the basis that the facts pleaded by the Petitioner are assumed or taken to be correct at that juncture. If there is any contest on facts, a preliminary objection cannot be raised. The Petitioner in this case alleges that the 4th Respondent systems failed and this caused money they had paid to the 1st Respondent through the 4th Respondent system not to be refunded in time to be utilized as court cash bail. The 4th Respondent does not acknowledge any failure in its system even for purposes of this objection which means this is a contested factual matter that will have to be ascertained through evidence. This point alone disqualifies this Preliminary Objection as such.
22. Moreover, the instant preliminary objection is based on the premise that the Petition does not disclose any cause of action as against the 4th Respondent. It should be remembered that the lack of reasonable cause of action is not the same thing as lack of evidence, it only implies that based upon the assessment of pleadings there is no valid legal claim or action. A cause of action is thus based on a party’s pleadings only and in this case, one question that one would be asking is if the allegations made would amount to violation of the Petitioner’s right assuming them to be correct. In *Isaiab Ondiba Bitange v & 3 others v Institute of Engineers of Kenya another* [2017] eKLR the Court discussed what amounts to a reasonable cause of action as follows:

“... the expression “reasonable cause of action” [4] No exact paraphrase can be given, but I think “reasonable cause of action” means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out.”

23. The Court went further to state as follows:

“The purpose of pleadings is to enable the defendant to know the case he had to meet so that he could properly plead his defence with the result that the issues would be sufficiently defined to facilitate the appropriate questions for decision to be resolved. This purpose cannot be achieved unless the words are pleaded with sufficient particularity. Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly



what case each party is making. They act as a measure for comparing the evidence of a party with which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial.

The pith and marrow of it is that where on a consideration of only the allegations in the pleading the court concludes that a cause of action with some chance of success is shown then that pleading discloses a reasonable cause of action. Person, J in *Drummond Jackson v British Medical Association*, the definition of a cause of action was determined as an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”

24. Likewise, the Court in [Njunge v Ministry of Interior & Coordination of National Government & 3 others](#) (Civil Suit 7 of 2019) [2024] KEHC 4676 (KLR) (Civ) (16 April 2024) (Ruling) citing a number of authorities with approval noted thus:

“That the application discloses no reasonable cause of action or defence in law. In *DT Dobie & Co. (Kenya) Limited v Muchina & another* [1982] KLR, the Court of Appeal defined reasonable cause of action to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer...” The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint... A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right by another person...”

25. Assuming what the petitioners allege in the Petition is correct, that they paid for cash bail to the police through the 4th Respondent Mpesa systems and when they wanted a refund so that they could utilize it to pay for the cash bail, they did not get it because the 4th Respondent system was not working. Should this be proved, wouldn't that presumably be a basis for a cause of action, be it be weak or strong case against the 4th Respondent that requires to be responded to? Whether that allegation made against the 4th Respondent by the Petitioner is true or not, or backed by any evidence, is a question of fact, not law. As was held in [Oraro v Mbaja](#) 2015 1 KLR

“...Any assertion, which claims to be a preliminary objection, yet bears factual aspects calling for proof, or seeks 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. Where the court a court needs to investigate facts, a matter cannot be raised as a preliminary objection...”

26. In effect, the preliminary objection fails to satisfy the set threshold of a preliminary objection. Determining the same will not force the Court to consider issues of facts at a preliminary level rather than at the hearing.
27. The Preliminary objection raised by the 4th Respondent is untenable in law and is hereby dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT THIS 18TH DAY OF JULY, 2024.

.....

L N MUGAMBI



JUDGE

