



**Ali & 4 others v Gashambi & 8 others (Constitutional Petition
8 of 2019) [2024] KEHC 8072 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CONSTITUTIONAL PETITION 8 OF 2019**

SM GITHINJI, J

JULY 4, 2024

BETWEEN

**SHARIF SAID ALI 1ST PETITIONER
MASOUD ALI KARISA 2ND PETITIONER
ABDU ALI KARISA 3RD PETITIONER
AWADH MBARAK HASSAN 4TH PETITIONER
HUSSEIN ABDALLA ALI 5TH PETITIONER**

AND

**MASOUD GASHAMBI 1ST RESPONDENT
EVANS NYARANGO 2ND RESPONDENT
BADESA ALI ISLAM 3RD RESPONDENT
HAWA MOHAMED SHALLY 4TH RESPONDENT
MBWANA MOHAMED MBWANA 5TH RESPONDENT
ISLAM ABDALLA MASUD 6TH RESPONDENT
ABDALLA ISLAM ABDALLA 7TH RESPONDENT
KIPINI BEACH MANAGEMENT UNIT 8TH RESPONDENT
COUNTY GOVERNMENT OF TANA RIVER 9TH RESPONDENT**

RULING

1. Before the court for determination is the Notice of Motion dated 24th February 2023 seeking the following orders;



1. Spent.
 2. That a warrant of arrest be issued against the 2nd Respondent and be brought to court to show cause why he should not be punished for disobedience of the court orders given on the 3rd November 2022.
 3. That the Honourable court be pleased to order that the 2nd Respondent herein Evans Nyarango be committed to civil jail for a term not exceeding (6) months for being in contempt of the mediation order adopted by this Honourable court on 3rd November 2022.
 4. That the County Commander-Tana River County and/or the OCS Hola Police station be ordered to effect the orders herein.
 5. That the Honourable court be pleased to order that the Elections conducted on 14th December 2022, at Kipini Fisheries Hall by the 2nd Respondent were null and void since they did not adhere to the mediation order that was adopted by this Honourable court.
 6. That the costs of this application be awarded to the Applicant.
2. The application is founded on the grounds set out on its face and on the Supporting affidavit of Sharif Said Ali the 1st Applicant who deponed that this matter was referred for mediation and parties reached at an agreement through a Mediation Settlement Agreement dated 10th December 2021 which agreement was duly executed. He stated that the said Mediation Settlement Agreement was adopted as an order of the court and the court issued the orders clearly stating how the elections for the Kipini Beach Management unit were to be conducted. It was averred that the 2nd Respondent being the Director of the 9th Respondents conducted elections without adhering to the agreed rules as was ordered after the mediation, yet the parties had agreed to be bound by Section 14 and 15 of the [Beach Management Unit Regulations](#) of 2007. It was further deponed that the disregard of the mediation order adopted by the Honourable Court amounts to an affront to the dignity of the court and the Respondent has refused to and/or neglected to obey the said order to date.
 3. In response the 1st, 2nd and 9th Respondents filed both a P.O and a replying affidavit. The PO in a nutshell is brought on grounds that the application is brought under the wrong provisions of law without leave of the court. In the supporting affidavit sworn by Evans Nyarango the 2nd Respondent, who is the County Director of Fisheries of the 9th Respondent, he deponed that the application is defective as the same is brought pursuant to Section 63 (c) of the [Civil Procedure Act](#), Order 40 Rule 3 (1) of the [Civil Procedure Rules](#) as opposed to Section 5 of the [Judicature Act](#) as the alleged breach does not relate to an order in the nature of an injunction. Mr. Evans Nyarango further deponed that the parties herein were referred to mediation where they agreed to conduct fresh elections but the modalities, regulations and the register to be used during the fresh elections were not agreed upon until 3rd November 2021 as per the Mediation orders. It was additionally stated that on 6th October 2022 nominations were carried out, the presiding officer was appointed and complaints period of 21 days was communicated. Further, that on 14th December 2022 the elections were carried out and the 8th and 9th Respondents followed the due legal process and in accordance with the by-laws.

Disposition

4. The application and the PO were disposed of by way of written submissions. I have considered the submissions as well as the authorities relied upon. For determination is whether the PO and the orders for contempt sought are merited.



5. The parameters of consideration of a preliminary objection are well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“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.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

6. The PO herein is raised on grounds that the Application is premised on the wrong provisions of law. In my view, this ground does not fall within the confines of a PO as it is a technicality and the application at hand should be determined on merit. In so finding, I am guided by the provisions of Article 159 (1) (d) of the *Constitution* of Kenya, 2010 and the finding in *Gitau v Kenya Methodist University (Kemu)* (Petition 5 of 2020) [2021] KEHC 322 (KLR) where the court observed as follows;
7. In *Anchor Limited v Sports Kenya*[2017]eKLR the court while searching for a fitting definition of procedural technicalities had this to say:-

“10. One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwongo, in *Kenya Ports Authority v Kenya Power & Lighting Co. Limited* (2012) eKLR and another one supplied by the Learned Hon. Justice C.W Githua in *James Muriithi Ngotho & 4 Others v Judicial Service Commission* (2012) eKLR: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwongo defined a technicality thus:

Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

16. Whatever definition we adopt; courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. Simply put, to be preferred is an approach that places emphasis on merits as opposed to undue technicalities. Courts should critically



examine the meaning of the “on the merits,” how the principle has permeated our procedural theory and architecture, courtesy of our transformative, liberal and progressive Constitution and why, despite the allure of the procedural rules, we should prefer the “determination on the merits” principle.”

8. On the issue of contempt of court, The Court of Appeal in *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR explained:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. ...Secondly, as this Court emphasized in *Jihan Freighters Ltd v Hardware & General Stores Ltd and in A.B. & Another v. R. B.* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v Baharini Farm (supra)* and *Republic v. Ahmad Abolfathi Mohammed & Another (supra)*.)”

9. The Applicant’s case is that the 1st, 2nd and 9th Respondents did not abide by the Mediation Settlement Agreement which was adopted as an order of the court. I have perused the Mediation Settlement Agreement and note that the following orders were made;

1. Parties agree to be bound by Section 14 and 15 of the *Beach Management Unit Regulation* of 2007 in conducting the elections.
2. Members list to be used.
3. Fisheries department to come up with the nominated list of candidates for election and will issue 21 days for any complains to be raised before the elections are conducted.

10. The 1st, 2nd and 9th Respondents through the 2nd Respondent stated that they abided by the orders of the Mediation Settlement Agreement. They attached a list of members showing the registered members as at 7th October 2019. Further, they produced a list of the nominated members for the election. I do note that at the bottom of the document they indicated that the list of nominees was put in public places for the BMU members to raise any issues on them. They further produced letters where members raised issues regarding the nominees and a response to the letters. In my view, the Applicants have not demonstrated how the Respondents did not abide by the Mediation Settlement Agreement. Additionally, they have not disproved the evidence produced by the Respondents. In the circumstance therefore, I do not see how the Respondent are in contempt of the orders as per the Mediation Settlement Agreement which were adopted as an order of this court. Consequently, the Application is dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 4TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the absence of: -

1. Miss Otieno for the Petitioners



2. Mr Bake for the 1st, 2nd and 9th Respondents.

