



**Chalbi Muslim Welfare Association v Board of Management, Maikona Primary School & 2 others (Petition E005 of 2023) [2024] KEHC 13944 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13944 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
PETITION E005 OF 2023  
JN NJAGI, J  
OCTOBER 17, 2024**

**BETWEEN**

**CHALBI MUSLIM WELFARE ASSOCIATION ..... PETITIONER**

**AND**

**BOARD OF MANAGEMENT, MAIKONA PRIMARY SCHOOL .... 1<sup>ST</sup>  
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner herein has filed an application dated 22<sup>nd</sup> May 2024 seeking for orders that:
  1. Spent
  2. Spent
  3. The 1<sup>st</sup> Respondent should not participate in these proceedings until it purges the contempt through the head teacher, Ibrae Koke Kiro.
  4. That the 1<sup>st</sup> Respondent's Head Teacher Mr. Ibrae Koke Kiro be committed to imprisonment for a term of six months for violation and or breach of the court order granted on 7<sup>th</sup> November 2023.
2. In response to the said application, the 1<sup>st</sup> Respondent has filed a Notice of Objection dated 12<sup>th</sup> September 2024 seeking for orders that:
  - (1) The petition dated 19<sup>th</sup> October 2023 together with any subsequent interim orders ought to be struck out for being in contradiction to the provisions of section 3 of the *Societies Act* Chapter 108 Laws of Kenya.



- (2) That in the instant matter, the suit has been filed by a religious organization which is not a body corporate capable of suing or being sued as a legal personality. That that being so it lacks the capacity to sue in its own name.
  - (3) That a society, as the Petitioner describes itself in this petition can only sue or be sued through its officials. That the petitioner does not disclose its registered officials who ought to institute the suit on behalf of its members.
3. Counsel for the Petitioner, Mr. Ochieng Ogutu, thereupon submitted that the court should not entertain the Preliminary Objection and should not give audience to the 1<sup>st</sup> respondent on the said notice until they purge the contempt. Counsel submitted that the Preliminary Objection is meant to circumvent the application by the petitioner against the 1<sup>st</sup> respondent's Head Teacher for contempt of court. According to him, a party in contempt should not be given audience until they purge the contempt or the application for contempt has been heard. Counsel urged the court to order that they first be heard on their application for contempt.
  4. Counsel for 1<sup>st</sup> respondent, Mr. Balala, on the other hand submitted that a Preliminary Objection can be filed at any time. That the Preliminary Objection should be heard first.
  5. Mr. Ochieng in response reiterated that there are orders on record which have not been complied with. That court orders should be obeyed and unless the orders are complied with, the party in contempt should not be given audience.
  6. I have considered the grounds in support of the application dated 22<sup>nd</sup> May 2024 and the Preliminary Objection application dated 12<sup>th</sup> September 2024. I have considered the arguments by the respective counsels for the parties. Mr. Ogutu for the Petitioner argues that the 1<sup>st</sup> respondent should not be given audience for failure to purge the contempt and that their application for contempt should be heard first. Mr. Balala for the 1<sup>st</sup> respondent on the other hand argues that the Preliminary Objection should be heard first.
  7. The Preliminary Objection is based on the ground that the Petition dated 19<sup>th</sup> October 2022 is in contradiction of section 3 of the *Societies Act* in that the same has been filed by a religious organization which is not a body corporate with capacity of suing or being sued as a legal personality and as such lacks the capacity to sue in its name. That as a society the Petitioner can only sue through its officials. That the Petitioner has not disclosed its registered officials who ought to institute the suit on behalf of its members.
  8. It is trite that Preliminary Objections on points of law can be raised at any stage of the proceedings. In the case of Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited [2015] eKLR (Nairobi Judicial Review Miscellaneous Application No 2 Of 2015) the court observed that:-

“...the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of *Beatrice Cherotich Koskei and Another –vs- Olenguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007*, the court observed as follows:

“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at



the earliest possible opportunity. I, therefore, hold that respondents' counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon."

These sentiments echoed the view of the court in the case of *Ali Osban and Others -vs- Mrs. Catherine Kaswii Nyiba and Others Misc Civil Application 525 of 2002* where the court stated as follows:

"It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of Article XIX (1) to commence proceedings in a court of law but to refer them to Arbitration. ... It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr. Gikandi is perfectly right to raise the preliminary point at this stage..."

9. In view of the above, I do not think that it is proper to lock out the 1<sup>st</sup> respondent out of these proceedings. I am of the considered view that the Preliminary Objection and the contempt proceedings can be heard simultaneously. I accordingly order that the application for contempt dated 22<sup>nd</sup> May 2024 and the Preliminary Objection dated 12<sup>th</sup> September 2024 be heard simultaneously. The court will proceed to give directions on how to proceed with the hearing of the two applications.

**DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> OCTOBER 2024**

**J.N. NJAGI**

**JUDGE**

In the presence of:

Mr. Ochieng Ogutu for Petitioner

Mr. Balala for 1<sup>st</sup> Respondent

Miss Ogola holding brief Mr. Nguyo Wachira for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Assistant Jarso

30 days R/A.

