Munyiri v Attorney General & another (Petition 400 of 2014) [2023] KEHC 22358 (KLR) (Constitutional and Human Rights) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22358 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 400 OF 2014

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

FRANCIS MWANGI MUNYIRI ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE ... 2ND RESPONDENT

RULING

1. The genesis of the instant case is a dispute that arose between the petitioner and the respondent following the 1982 Coup d'état. This petition was filed against the respondent for violation of the petitioner's constitutional rights. It was heard and Justice E.C. Mwita delivered the judgment dated 24th November 2017 in favour of the petitioner and awarded him damages. The decree was soon after issued on 27th November 2017 and served on the respondents.

The Respondents' Case

2. The respondent filed a preliminary objection dated 7th February 2022 to the petitioner's application dated 30th June 2020 which seeks to cite the 2nd respondent for contempt of the decree issued on 27th November 2017. According to the petitioner, the respondents have failed to satisfy the decree.

3. This Court on 27th April 2022 directed that the preliminary objection be heard first. The preliminary objection is premised on the grounds that:

    i. The application is fatally defective for offending the provisions of Section 21 of the *Government Proceedings Act*, Cap 40, Laws of Kenya and Order 29, rule 2(2)(b) of the *Civil Procedure Rules*, 2010.

ii. The application is fatally defective for ambiguity as it does not seek for any particular person to be cited for contempt.

iii. The 2nd respondent has been improperly enjoined without the leave of this Honourable Court.

iv. The supporting affidavit is utterly defective for contravening Sections 5 and 7 of the O*aths and Statutory Declarations Act*, Cap 15, Laws of Kenya.

v. The application and the supporting affidavit are therefore bad in law and ought to be expunged from the record.

The Petitioner's case

4. The petitioner did not file a response to the preliminary objection but filed written submissions dated 18th May 2022 in opposition through the firm of Michael Daud and Associates.

5. Counsel commenced by asserting that the petitioner's application was in compliance with procedural law for a number of reasons. First on whether the application is defective in view of Section 21 of the *Government Proceedings Act* and Order 29, Rule 2(2)(b) of the *Civil Procedure Rules*, 2010 it was submitted that this Order does not bar the instant proceedings as alleged. This he argues is because the Notice of Motion is based on contempt proceedings and not execution proceedings.

6. Furthermore, Counsel submitted that both respondents were personally served with the Certificate of Order on 13th February 2018. It was stated that upon service the accounting officer who is the principal secretary was bound to pay the decretal sum. In support he cited the case of *Republic v Permanent Secretary, Ministry of State For Provincial Administration And Internal Security Exparte Fredrick Manoah Egunza* [2012] eKLR where it was held that once the Certificate of Order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.

7. On the ground that the petitioner had not stated a specific name to cite for contempt, counsel submitted that the 2nd respondent had been rightfully cited and failure to mention a specific name was not fatal to the application as it does not seek individual liability. To buttress this point reliance was placed on the case of *Republic v Attorney General & another Exparte James Alfred Koroso* [2013] eKLR where it was held that the relief sought arises out of subsection (3), and is not execution or attachment or process in the nature thereof. It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. Also see: *Republic v Principal Secretary State Department of Interior ex parte li wenji & 2 others* [2020] eKLR.

8. Counsel further submitted that it was not in dispute that the 2nd respondent is the accounting officer. Furthermore, that in the respondents' replying affidavit dated 19th July 2019, Saitoti Torome averred that he was the Principal Secretary of the Ministry of Defence hence was already on Court record. Thus failure to state the 2nd respondent's name was a procedural technicality which ought not be allowed to defeat justice.

9. Relying on the case of *Jamii Bora Kenya Limited v Esther Wairimu and another* [2019] eKLR counsel contended that a preliminary objection is only supposed to raise pure points of law. Therefore the issue

of the credibility of the Commissioner of Oaths as at the time of stamping the impugned supporting affidavit can only be determined by evidence being adduced. To him this would not be a point of law.

The Respondents' Submissions

i. Special State Counsel W.W. Kimotho on behalf of the respondents filed written submissions dated 16th May 2022 in support of their preliminary objection on whether the application is fatally defective.

Counsel submitted that Section 21 (4) of the *Government Proceedings Act* prohibits execution or attachment of process of this nature against the Government as a means for enforcing orders and decrees by the Court. Further that Order 29 Rule 2 (2) (b) of the *Civil Procedure Rules* 2010 provides that no order maybe made against the Government under Order 22 relating to execution of decrees and orders. Considering this he argued that the Notice of Motion clearly offends these provisions and so ought to be struck out.

10. On whether the contempt proceedings were improperly instituted by the Petitioner he answered in the affirmative, saying he had approached the court by way of application for sentencing of the Permanent Secretary in the Ministry of Defence instead of seeking the judicial review relief of mandamus in total violation of Order 53 of the *Civil Procedure Rules*. Emphasis was drawn to the fact that this is an execution process against the government and its officials' and the application side stepped Section 21 of the *Government Proceedings Act* and Order 53. Correspondingly, Counsel stressed that the process of executing proceedings against the government, by seeking arrest of the 2nd respondent is irregular and contrary to the *Government Proceedings Act*.

11. He relied on the case of *Nahashon Omwoha Osiako & 66 Others v Attorney General Amicus Curiae Kenya Section of International Commission of Jurists* (2017) eKLR where it was held that the statutory duty to satisfy a judgment made by the court by the accounting officer of the relevant Government department is normally enforced by way of judicial review proceedings in the nature of mandamus by which the Court compels the satisfaction of a duty that has become due. Also see (i) *Republic v Town Clerk, Kisumu Municipality Ex parte East African Engineering Consultants* (2007] 2 EA 441, (ii) *The County Government of Isiolo v Shariff Ibrahim Farah* (2019) eKLR (iii) *Maggy Agulo Construction Co Limited v Ministry of Public Health &4 others* (2020] eKLR.

12. On whether the application was fatally defective, Counsel noted that the petitioner in the application had only cited in general terms, the Permanent Secretary in the Ministry of Defence for contempt and failed to include the specific name of person on whom the orders were being sought against and directed to as required.

13. Counsel while relying on Order 1, rule 15 of the *Civil Procedure Rules* 2010 submitted that the 2nd respondent was not a party in the original suit and so the petitioner was required to seek the leave of Court under this Order to have him enjoined as a party. This was not done hence amounting to abuse of the Court process.

14. Finally, Counsel submitted that the Counsel who commissioned the supporting affidavit to the petitioner's application dated 30th June 2020 called Evans Ochieng advocate (Membership no. P.105/14418/18) commissioned the affidavit in the year 2020 before completing three (3) years in practice to qualify as a Commissioner of Oaths. The advocate had been commissioned later in June 2021.

15. His action thus contravened Sections 5 and 7 of the *Statutory Declarations Act.*

Analysis and Determination

16. Having considered the pleadings and submissions of the parties herein, the issues I find falling for determination are:

    i. Whether the preliminary objection dated 7th February 2022 has met the threshold.

    ii. Whether the preliminary objection is merited.

Whether the preliminary objection dated 7th February 2022 has met the threshold

17. The threshold of a preliminary objection was set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Ltd* (1969) EA 696 as follows:

> "...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit."

18. The Court went further to note that

> "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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."

19. In the case of *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017)eKLR the court opined as follows:

> "In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

20. The preliminary objection in this case is premised on a number of grounds. The grounds are based on the alleged violation of the *Government Proceedings Act*, the *Civil Procedure Rules*, 2010 and the *Oaths and Statutory Declarations Act*. As has been discussed in the foregoing paragraphs, preliminary objections revolve around questions of law only. These questions are determined by the application of the pertinent law and interpretation of legal principles without the need to examine the evidence in support of pleaded issues. In effect, determination of these questions of law is sufficient to dispose of the matter at that juncture.

21. It is my considered view that the instant preliminary objection meets the threshold of a pure point of law. I say so because it concerns compliance with the law in the drafting of the petitioner's Notice of

Motion dated 30th June 2020. Answering the questions as such will not require this Court to investigate the evidence adduced to make a finding. In determining this question this Court is required to only ascertain the law against the ground of objection.

Whether the preliminary objection herein is merited

22. Palpably, this Court is only required to determine the preliminary objection based on the law and not on contested facts.

a. Whether the application offends Section 21 of the Government Proceedings Act, Cap 40, and Order 29, Rule 2(2)(b) of the Civil Procedure Rules, 2010

23. The main contention in the preliminary objection is that the petitioner's application is in violation of the cited provisions. These provisions provide as follows:

> Section 21 of the *Government Proceedings Act*: Satisfaction of orders against the Government
>
> 1. Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.
>
> (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.
>
> (3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon: Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.
>
> (4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

Order 29 of the *Civil Procedure Rules*, 2010: Rules to apply to proceedings by or against the Government

Rule 2(2)(b) - No order against the Government may be made under—

(b) Order 22 (Execution of decrees and orders).

24. It was argued that the contempt of court proceedings were improperly instituted since they are basically execution proceedings. On the flipside, the petitioner argued that these provisions were not applicable in the instant suit since the application was based on contempt proceedings not execution proceedings. Nevertheless he informed that the respondents had been served with the Certificate of Order on 13th February 2018 and as such the Principal Secretary, 2nd respondent was bound to pay the decretal sum.

25. Plainly, the petitioner made known in the application dated 20th June 2020 that the premise of the application was contempt of the decree issued on 27th November 2017, since the 2nd respondent has failed to satisfy it. Considering this, the substratum of the application is failure by the respondents' to satisfy the decree which led to instigation of the contempt of court proceedings with a view to have the respondents to satisfy it.

26. Unmistakably, the respondents' liability to satisfy the decree under Section 21 of the *Government Proceedings Act* arose after the Certificate of Order was issued on 13th February 2018. It is not in dispute that this decree has not yet been satisfied by the respondents. Rightly, the petitioner is entitled in law to approach the Court for redress where the respondents fail to satisfy the decree.

27. Discussing failure by the government to satisfy the decretal sum in the case of *Republic v Permanent Secretary, Ministry Of State For Provincial Administration And Internal Security Exparte Fredrick Manoah Egunza* (supra) the Court observed as follows:

> " In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*."

28. This position was correspondingly emphasized in the case of Republic v County Secretary Migori County & another Ex parte Linet Magambo [2020] eKLR where it was held that :

> " Execution of decrees against the Government is not undertaken as in the ordinary civil cases but must be in accordance with Provisions of the *Government Proceedings Act*... It is settled

> law that before an order of mandamus is issued, an applicant must abide by the procedure in Section 21 of *Government Proceedings Act* and Order 29 *Civil Procedure Rules*... The reason why this strict Procedure is followed was explained by the Court of Appeal in *Kisya Investments Ltd v AG* (2005) 1 KLR 74. The court said: - "Order 28, rules 2(1)(a), (2) and (4) of the *Civil Procedure Rules* subject themselves to the provisions of the *Government Proceedings Act* which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice, the courts are bound to apply the law as it exists... History and rationale of Government's immunity from execution arises from the following:- Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgements is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure...Thus If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property."

29. A perusal of the application makes it known that the petitioner instituted execution proceedings disguised as contempt of court proceedings. As provided under the law, execution proceedings cannot be brought against the government. The only way one can seek redress is by seeking an order of mandamus from the Court which the petitioner failed to do. In the circumstances the respondents' objection in this regard is merited.

b) Whether the application is defective for its failure to cite a particular person for contempt

30. While the respondents stressed that in contempt proceedings one must cite a specific person for contempt, the petitioner opposed the argument stating that the proceedings were not as against the 2nd respondent at a personal level to necessitate stating the name in the application.

31. The procedure for instituting contempt of court proceedings finds its bearing under Section 5 of the *Judicature Act* Cap 8 which provides as follows:-

> The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

32. The Court in the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR discussing the elements that should be satisfied in a case of contempt of Court observed as follows:

> "...the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the *Judicature Act* [5] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought... Discussing the procedure in England, the Court of Appeal in *Christine Wangari Chege v Elizabeth Wanjiru Evans & others* [7] observed as follows:-
>
> Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-
>
> i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
>
> ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
>
> iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
>
> iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
>
> v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
>
> vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
>
> The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise."

33. It is discernible that the law and various authorities on the issue of stating a particular name in the application is silent. What is imperative however is that the statement and affidavit must be served personally on the person sought to be committed. The petitioner asserts that they personally served the 2nd respondent with the application following the Court Order to do so. This in essence satisfied one of the set conditions for an application for contempt.

34. In the circumstance I find myself rejecting the respondents' argument that the specific name of the 2nd respondent ought to have been explicitly cited since it has no legal basis. Accordingly I find that this objection is not merited.

c) Whether the 2nd Respondent was properly enjoined in the instant suit

35. The respondents opposed the manner in which the 2nd respondent was enjoined in the suit. The petitioner who did not deny the fact asked the Court to overlook the same as a procedural technicality

also noting that the 2nd respondent was already on the Court record. To support this claim, the respondents' relied upon Order 1 Rule 15 of the *Civil Procedure Rules*, 201 which provides as follows:

Notice to third and subsequent parties (Order 1, rule 15.)

1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—

a. that he is entitled to contribution or indemnity; or

b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

36. Correspondingly, the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 on joinder of parties in a suit provides as follows under Rule 5:

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

37. It is discernible that the law in both requires a party desirous to have another party enjoined in the suit to make an application before Court to signify this intention. Rule 5 (d) further informs that the only instance where a party can be joined without an application before the Court is where the Court adds a party suo muto, and this must obviously be for good reasons. This was not the case in this matter.

38. In my understanding, while the petitioner in the initial joinder of parties while filing the petition is at liberty to cite all persons it deems appropriate to bring the cause of action against, the subsequent decision to enjoin an additional party once the suit commences can only be done after making an application to the Court and receiving its permission to do so. Adherence to this legal principle cannot thus be deemed to be a technicality with the intention to defeat justice. In view of this I find the respondents' objection in this regard to be merited.

39. I find useful guidance on this matter in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR where Kiage JA, held:

"I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate

> and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

Also see: *Charles Juma Mulwa v Peter Makau Ndeti & Esther Mbula Makau (suing on their own behalf and as administrators of the Estate of Makau Alex Nzomo Muendo* [2020] eKLR.

d) Whether the petitioner's supporting affidavit defective for contravening Sections 5 and 7 of the Oaths and Statutory Declarations Act, Cap 15

40. Sections 5 and 7 of the *Oaths and Statutory Declarations Act* provide as follows:

> Section 5: Particulars to be stated in jurat or attestation clause
>
> Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
>
> Section 7: Penalty for unlawfully acting as commissioner for oaths
>
> Any person who holds himself out as a commissioner for oaths or receives any fee or reward as a commissioner for oaths shall, unless he has been appointed as such under this Act, be guilty of an offence and, in addition to any other penalty or punishment to which he may be liable by any law in force, be liable to a fine not exceeding six hundred shillings, and for a second offence, in addition to any other penalty or punishment, shall be liable to a fine of two thousand shillings or imprisonment for a term not exceeding six months or to both such fine and imprisonment.

41. The fact upon which this ground is based was contested. According to the petitioner, the variance in dates of commissioning of the affidavit and application had a reasonable explanation. That the variance was based on the Court's Order on 14th December 2021 which directed the petitioner to personally serve the Permanent Secretary, Ministry of Defence with the Notice of Motion dated 30th June 2020. It was noted that initially the application had been filed electronically. On the other hand, the respondents argued that the advocate who commissioned the affidavit was not qualified to do so at the time hence violating the cited provisions.

42. A perusal of this ground as framed makes it clear that although it is based on a question of law, it directly flows from a contested issue. An answer to this question can only be arrived at upon interrogation and examination of the facts from both parties to ascertain the veracity of the claim and its compliance with the cited law. Manifestly, this Court at this point cannot solely make its determination on the competence of the supporting affidavit by applying legal principles. Rather its decision on this issue will be informed by evidence to be adduced. Plainly, at this juncture this Court must restrain itself from analyzing the evidence in view of the features of a preliminary objection. As such this ground cannot be deemed as a pure point of law.

43. Guided by the applicable principles laid down in the law and cited authorities, I have found that:

    i. The Notice of Motion dated 30th June 2020 offends the *Government Proceedings Act* (Cap 40) and Order 29, Rule 2(2) (b) of the Civil Procedure Rules 2020.

    ii. The enjoinment of the 2nd respondent was not done in line with Order 1 Rule 15 of the *Civil Procedure Rules* and Rule 5 of the *constitution* of Kenya. (Protection of Rights & Fundamental Freedoms) Practice and Procedural Rules 2013.

44. Having so found I have come to the conclusion that the preliminary objection dated 7th February 2022 has merit and is allowed. The upshot is that the Notice of Motion dated 30th June 2020 is dismissed with costs.

    Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT