



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 455 OF 2018

CONSUMERS FEDERATION OF KENYA.....PETITIONER

VERSUS

TOYOTA MOTORS CORPORATION.....1<sup>ST</sup> RESPONDENT

TOYOTA KENYA LTD.....2<sup>ND</sup> RESPONDENT

TSUSHO CAPITAL LTD.....2<sup>ND</sup> RESPONDENT

KENYA BUREAU OF STANDARD.....4<sup>TH</sup> RESPONDENT

ARVINDER SINGH REEL.....5<sup>TH</sup> RESPONDENT

RULING

1. In this petition, Consumers Federation of Kenya is the Petitioner. Toyota Motors Corporation, Toyota Kenya Limited, Tsusho Capital Limited, Kenya Bureau of Standards and Arvinder Singh Reel are the respective 1<sup>st</sup> to 5<sup>th</sup> respondents.

2. This ruling relates to the notice of preliminary objection dated 6<sup>th</sup> May, 2019 filed by the 2<sup>nd</sup> and 5<sup>th</sup> respondents through which they oppose these proceedings and seek to have them struck out on the grounds that:-

**“a. THAT the petitioner lacks the requisite *locus standi* to institute these proceedings, neither do the proceedings disclose a *prima facie* constitutional law issue.**

**b. THAT the 5<sup>th</sup> Respondent’s personal joinder to the proceedings is misconceived and unwarranted.**

**c. THAT there is pending before the High Court of Kenya at Nairobi, Commercial and Admiralty Division, a product liability suit that raises similar issues to the matters in this suit, being HCCC NO. 231 of 2019 Martin Mwangi Njoki & 10 others v Toyota Kenya Limited & 4 others. The filing of these proceedings by the Petitioner, without the disclosure of the aforesaid pending matter, amounts to an abuse of the court process as it invites potential conflicting decisions being arrived at by different Courts on similar matters.”**

3. The 2<sup>nd</sup> and 5<sup>th</sup> respondents filed submissions dated 9<sup>th</sup> March, 2020 in support of their preliminary objection. The Petitioner opposed the preliminary objection through submissions dated 5<sup>th</sup> December, 2020.

4. In a preliminary objection like the one before this court, the parties usually do not disagree on the applicable principles of law. Their disagreement is usually on how the law should be applied to the facts of the case before the court. For that reason, I will not recite the submissions of the parties.

5. The first issue for the determination of the court is whether the 2<sup>nd</sup> and 5<sup>th</sup> respondents’ preliminary objection meets the legal definition of a preliminary objection.

6. In **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** New Bold, P stated 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.”**

7. In **Oraro v Mbaja [2005] eKLR**, J. B. Ojwang, J (as he then was ) observed that:-

**“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 processes of evidence. Any assertion which claims to be a preliminary objection, and 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. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.””**

8. From the cited authorities, the law is therefore clear that a preliminary objection is only allowable where it raises a pure legal issue that does not require the court to analyse the evidence in order to make a determination. The facts should not therefore be in dispute.

9. In opposing the notice of preliminary objection, the Petitioner’s counsel submits that the 2<sup>nd</sup> and 5<sup>th</sup> respondents make reference to Nairobi HCCC No. 231 of 2017 which is a product liability suit in which the subject matter in dispute is HINO 500 trucks and is completely different from what is before this court in which the subject matter is HINO 300 buses. Counsel submits that this bears factual aspects calling for proof or production of evidence for its authentication and therefore the preliminary objection before this court does not meet the salient rules of a preliminary objection. Counsel also contends that striking out a matter is such a draconian measure that must be exercised with caution and as a last resort.

10. On the issue of *locus standi*, counsel for the Petitioner contends that the same goes to the root of the matter. This, he states is not a point of law with ascertained facts. It is counsel’s position therefore that the issue of *locus standi* falls outside the purview of a preliminary objection.

11. There is indeed merit in the Petitioner’s submission that the issue of *locus standi* in the circumstances of this case, is not something that can be addressed through a preliminary objection. The emerging jurisprudence tend to lean towards allowing substantive litigation rather than stymieing cases with defences like *locus standi*, more so, as a preliminary objection.

12. The question as to whether the 5<sup>th</sup> Respondent is a necessary party is also not an issue to be addressed through a preliminary objection. There are other more efficient procedures that allows a party to get out of a constitutional petition.

13. The only issue left standing is whether this petition is *sub judice*. The *sub judice* principle is legislated by Section 6 of the Civil Procedure Act, Cap 21 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.**

***Explanation.*—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”**

14. The 2<sup>nd</sup> and 5<sup>th</sup> respondents’ case is that the issues raised herein are similar to the ones raised in HCC No. 231 of 2017. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein are parties to the proceedings in HCCC No. 231 of 2017. The decision of Olola, J in **Garder General Trading Limited v County Government of Kilifi, Department of Land, Housing and Physical Planning & another [2018] eKLR** is cited in support of the proposition that a petition that is being wrongly used as a substitute for ordinary civil dispute resolution systems should be struck out.

15. None of the parties bothered to place before this court the pleadings in Nairobi HCCC No. 231 of 2017. In its submissions, the Petitioner exhibited a ruling delivered by F. Tuiyott, J in that case on 8<sup>th</sup> March, 2018. The ruling discloses that the claim revolves around HINO FC 500 trucks. The petition before this court is specific to motor vehicle registration Number KCG 516G HINO bus. Nobody has told this court that the owners of the said motor vehicle are parties in Nairobi HCCC No. 231 of 2017. The Petitioner herein had no responsibility for disclosing a case that did not concern its petition.

16. In summary, the 2<sup>nd</sup> and 5<sup>th</sup> respondents have not made out a case for allowing their preliminary objection. The same is found to be without merit and is dismissed. The costs shall abide the outcome of the petition.

**Dated, signed and delivered virtually at Nairobi this 14<sup>th</sup> day of May, 2020.**

**W. Korir,**

**Judge of the High Court**