



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 59 OF 2017

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA
IN THE MATTER OF ARTICLES 10, 22, 23, 43, 47, 48, 50, 55, 159, 161, 165 AND 259 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA

THE ALLEGED CONTRAVENTION OF ARTICLES 10, 22, 23, 43, 47, 48, 50, 55, 159, 161, 165,
AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF RULES 10, 11, 23 AND 24 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES

IN THE MATTER OF THE SPORTS TRIBUNAL

BETWEEN

SAM NYAMWEYA.....1ST PETITIONER

AND

NICK MWENDWA & ROBERT MUTHOMI BEING SUED AS REPRESENTATIVES
OF FOOTBALL KENYA FEDERATION.....2ND PETITIONER

KENYA PREMIER LEAGUE.....3RD PETITIONER

RULING

Introduction

I find it absolutely necessary to start by defining what constitutes a preliminary objection on a point of law. 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.

Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs*

Westend Distributors Ltd[1] said:-

"...so far as I am aware, 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. 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."

In the words of Sir Charles Newbold P at page 701, B:-

"...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."

Counsels for the first and second Respondents raised an objection to this petition citing two grounds, namely, (a) that the petition does not disclose violation of constitutional rights in that it is not sufficient for the petitioner to allege constitutional rights and that the petition lacks particularity; (b) that the subject of the dispute is the agreement marked SN7 annexed to the petitioners application, which agreement was entered between two legal persons and a dispute arose and that the same was heard by the Sports Tribunal and a determination made.

The first ground touches on matters of evidence and does not qualify to be a pure point of law at all. The second ground relates to the agreement referred to between Football Kenya Federation (FKE) and Kenya Premier League Ltd (KPL). The petitioner is not a party to the agreement. The petitioner is not a party to the proceedings in question. This ground cannot and does not qualify to be a preliminary objection on a pure point of law. It is argued that the petitioner lacks the locus standi to institute this matter. I find nothing to support this position.

Madan, JA, (as he then was) in *DT Dobie Co Ltd vs. Muchina*[2] stated that:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."(Emphasis added)

It is important to bear in mind that in exercising judicial authority, the courts and tribunals are under article 159 (2) (d) required to administer justice without undue regard to procedural technicalities. My strong view is that conduct of judicial proceedings and exercise of judicial authority is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, the right to a fair trial, the right to legal representation and access to justice cannot stand court scrutiny.

Rule 3(1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[3] provides that the overriding objective of the Rules is to facilitate access to justice for all persons as required under Article 48 of the constitution.

Rule (3) of the Rules, provides that the rules shall be interpreted in accordance with Article 259 (1) of the constitution and shall be applied with a view to advancing and realizing the-

(a) *rights and fundamental freedoms enshrined in the Bill of Rights; and*

(b) *values and principles in the constitution.*

Rule 8 provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to

make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I also find it necessary to recall the words of the court in *Dickson Karaba Vs. John Ngata Kariuki & Another*^[4] whereby the court stated as follows:-

"...striking out is a very serious matter, it is draconian and it should be resorted to as an avenue when the cause filed is hopeless or it is meant or intended to abuse the process of the court..."

Also relevant is the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General*^[5]

".....and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used and rarely, if ever, excepting in causes where the action is an abuse of legal procedure... To my mind, it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad". (Emphasis added)

All the above decisions are in agreement that our judicial system would never permit a party to be "driven from the judgment seat without any court having considered his right to be heard, excepting in cases where the cause of action is obviously and almost incontestably bad. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

In the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*^[6] it was held as follows:-

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

In my view, the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.^[7] The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal* ^[8] "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." **Lord Cairns** in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. In *Agip Kenya Ltd vs Highlands Tyres Ltd*^[9] the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given.

In my opinion, when we apply the principles laid down in the above judgments, the conclusion becomes irresistible that the preliminary objection raised in this case has no merits at all. *Considering the principles, purposes and objectives of the constitution enumerated above, the right to be heard, I find myself unable to uphold the objection raised by counsels for the first and second Respondents.*

The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot

be gainsaid. A court orders curtailing those rights in must be in my view exercised in the most clearest cases and with extreme care and caution after the court is satisfied that a pure objection on a point of law has been proved otherwise such a decision would not easily pass constitutional muster.^[10]

In the final analyses, I find that the preliminary objection viewed in light of the constitutional tests discussed above, the relevant law and authorities, has no merits and I dismiss it with no orders as to costs.

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this **21st** day of **March** 2017

John M. Mativo

Judge

^[1] {1969} E.A 696 AT PAGE 700

^[2] [1982] KLR 1 at page 9:

^[3] Supra

^[4] {2010} e KLR

^[5] {1911} KB 418

^[6] Ibid

^[7] See Mamraj vs Sabri Devi, AIR 1999 P & H 96

^[8] air {1962} AC 527

^[9]{2001} KLR 630

^[10] Ibid