REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 38 OF 2017

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 27, 35, 75, 76, 77, 93, 94, 95, 96, 101, 102, 103 (F), 122 (3), 201 OF THE CONSTITUTION.

DISMAS WAMBOLA.....PETITIONER

VERSUS

CABINET SECRETARY, TREASURY.....1ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....2ND RESPONDENT

SALARIES AND REMUNERATION COMMISSION.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

THE NATIONAL ASSEMBLY.....5TH RESPONDENT

THE SENATE.....6TH RESPONDENT

RULING

Introduction

On 9th February 2017, the petitioner herein filed this petition against the Respondents seeking the following orders:-

> *a. A declaration that the current members of the 5th and 6th Respondents are not constitutionally and lawfully entitled to salaries and allowances covering the period after the term of the 11th parliament ends on 8.8.2017*
>
> *b. A declaration that any threat by the 5th and 6th Respondents not to pass any law or budgetary estimates unless they are paid salaries and allowances for the period after the expiry of the term of this Parliament on 8.8.2017 amounts to a threat to abdicate their constitutional duty and is therefore unconstitutional.*
>
> *c. An order restraining the 1, 2, 3 and 4 Respondents either directly or through their agents and or servants jointly and or separately from considering, advising, recommending, offering, approving or the making of payment of salaries and allowances and allowances to the MPs.*
>
> *d. Costs of the Petition.*
>
> *e. Any other or further relief that this court shall deem fit to grant in the interests of justice.*

The facts in support of the petition[1] are that there is information in the public domain that members of

the 5th and 6th Respondents have piled pressure on the government and demanded that they be paid salaries and allowances covering the period after the expiry of the term of parliament; and that there are reports that on 7th February 2017, officials of the 1st Respondent held a meeting with the members of the 2nd Respondent, and Parliament's Budget and Appropriation Committee and the 3rd Respondent to discuss the matter and further that members of Parliament were demanding that the pay should be included in the supplementary budget that was scheduled to be tabled in Parliament or else they would shoot the 2017/2018 budget if the payments are not made to them.

In support of the averments, the petitioner exhibited newspaper cuttings from the two leading dailies, namely the Standard and the Daily Nation all dated 8th February 2017 highlighting the said information.

Notice of preliminary objection

On 20th February 2017, counsel for the second Respondent filed a notice of a preliminary objection citing four grounds, namely; ***(a)*** *that the evidence in support of the petition is a copy of a newspaper article;* ***(b)*** *that the entire affidavit ought to be struck out for containing hearsay evidence and unsubstantiated "information in the public domain" and being contrary to the provisions of sections 62, 63, 107, 108 and 109 of the Evidence Act*[2] *and Order 19 Rule 3 of the Civil Procedure Rules;* ***(c)*** *that the petitioner has not complied with the requirements of section 8 of the Access to Information Act;*[3] *and* ***(d)*** *there is no evidence to support the petition, hence it ought to be struck off with costs.*

Petitioners Replying Affidavit

On 3rd March 2017, the petitioner filed a replying affidavit stating that the preliminary objection does not meet the test of a preliminary objection since it does not raise any pure points of law but rather raises factual issues touching on the sufficiency of the petitioners evidence; that the sufficiency or otherwise of the evidence can only be determined at the trial; that the second Respondent has not denied the truth of the allegations raised in the petition; that a party can move to court citing threat of violation of rights; that at the trial witnesses may be called, hence the petition does not meet the principles set out in Mukisa Biscuit Manufacturing Co. Ltd vs East End Distributors Ltd[4]

Submissions by counsel for the second Respondent

At the hearing of the preliminary objection, Mr. Njoroge for the second Respondent submitted that the preliminary objection is based on "no evidence to support the petition and argued that what is presented to the court is inadmissible and that the petitioner moved to court pre-maturely without following procedure set out in the law to secure information before coming to court." Counsel submitted that the sole evidence set out in the supporting affidavit is a newspaper cutting, and that newspapers are "hearsay" and the affidavit ought to be struck off. Counsel also cited sections 62, 63, 107, 108 and 110 of the Evidence Act[5] *and urged the court to reject the affidavit for being based on hearsay.*[6] *Counsel also submitted that this is not a procedural technicality.*

Submissions by counsel for the first and fourth Respondent

Mr. Mutinda for the first and fourth Respondents supported the preliminary objection and urged the court to up hold the objection.

Submissions by counsel for the third Respondent

On record are written submissions by counsel for the third Respondent filed on 28th March 2017 vehemently opposing the preliminary objection. Counsel cited the definition of a preliminary objection rendered in Mukisa Biscuit Manufacturing Co. Ltd vs East End Distributors Ltd [7] *and submitted that the preliminary objection does not raise a pure point of law. Counsel referred to section 62 and 63 of the Evidence Act and submitted that the contents of the newspaper article are facts which can be proved.*

Counsel submitted that the issue is whether the preliminary objection raises a pure point of law, and submitted that sections 62 and 108 of the Evidence Act[8] relate to burden of proof and that the facts in question can be proved at the hearing of the petition. On section 35 (1) of the Access to Information Act[9] counsel submitted that there is no legal requirement that a party seeks information before going to court and further that the petition derives its foundation from the facts which must be tested by normal rules of evidence and urged the court to dismiss the preliminary objection with costs.

Petitioners counsels submissions.

Mr. Ogoya *for the petitioner submitted that none of the reliefs sought in the petition is premised on the Access to Information Act[10]hence the argument advanced in support of the objection premised on Article 35 of the constitution and Access to Information Act[11] is misguided. Counsel also pointed out that no response has been filed against the petition.*

Mr. Ogoya *also cited Rule* ***11*** *of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[12] which stipulates* documents to be annexed to affidavit or petition. *Counsel submitted that Rule 10 does not prescribe that a petition must be supported by an affidavit and that the petition conforms to the Rules and that Rule 11 makes the material provisions, using the words 'may be supported by an affidavit". Sub-Rule 2 provides that if a party wishes to rely on a document, he shall attach it to the affidavit and that there is no general rule that a suit premised on a news paper must be struck of, and if at all a suit premised on a news paper ought to be dismissed, then that is not a point of law. Further, at the appropriate time, the petitioner may opt to call oral evidence or rely of affidavits or both and may call witnesses to prove the source of the newspapers and the contents including calling the reporters or the third Respondent to testify and reiterated that no affidavit has been filed refuting the allegations in the petition.*

Definition of a preliminary objection

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.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs.

Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*[13] 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.* ***The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)***

Useful guidance can be obtained from the decision in ***Omondi vs. National Bank of Kenya Ltd & Others***[14] where it was held that:-

> ***"The objection as to the legal competence of the Plaintiffs to sue……and the plea of*** *res judicata* ***are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters… What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done*** *ex debito justitiae* ***(as of right) but as a matter of judicial discretion."***

Also relevant is the decision by **Ojwang, J** (as he then was) where he expressed himself as follows:-[15]

> ***"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….. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop… The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. ….. …."(Emphasis added)***

Thus a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is **no** proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

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.[16] 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.[17]

The preliminary objection in this case is premised on the fact that the petitioner has attached newspaper cuttings in support of the petition. Evidently, *the objection touches on matters of evidence and does not qualify to be a pure point of law at all. The court cannot be called upon to investigate the truth, validity, veracity, admissibility or otherwise of evidence at this stage. This is an exercise that is undertaken at the hearing. Also, in support of the objection, counsels cited sections 107 and 108 of the Evidence Act.*[18]

The said sections deal with burden of proof. Sincerely, this is a burden that a litigant is required to discharge at the hearing but not at this stage. This is a matter of evidence which is being contested at this stage. This ground cannot and does not qualify to be a preliminary objection on a pure point of law.

Further, sections 62 and 63 of the Evidence Act[19] *were also cited. These sections deal with oral evidence. This provisions can only come into play at the time of adducing evidence. At this point in time the court cannot pre-judge how the petitioner will present his evidence.*

> *I also take the view that it has not been demonstrated that the petition is incompetent or fatally or incurably defective. Rule 11 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*[20] provides that:-
>
> *11. (1) The petition filed under these rules may be supported by an affidavit.*
>
> *(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.*
>
> *Rule 10 prescribes the contents of a petition. It provides as follows:-*
>
> *Form of petition.*
>
> *10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*
>
> *(2) The petition shall disclose the following—*
>
> > *(a) the petitioner's name and address;*
> >
> > *(b) the facts relied upon;*
> >
> > *(c) the constitutional provision violated;*
> >
> > *(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;*
> >
> > *(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;*
> >
> > *(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and*
> >
> > *(g) the relief sought by the petitioner.*
>
> *(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.*
>
> *(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.*

I find that the petition before the court conforms to the above provisions. Since the major contest is on the newspaper cuttings, it is important to refer to the definition of 'Document' in Article 260 of the constitution which defines document in the following terms:-

> *"document" includes-*
>
> *(a) any publication, or any matter written, expressed, or inscribed on any substance by means of*

letters, figures or marks, or by more than one of those means, that is intended to be used or may be used for the purposes of recording that matter;

The above definition is clear. A document includes a publication. Its relevancy, admissibility or otherwise as stated above will be determined at the hearing.

In support of the objection, Article 35 of the constitution and the provisions of Access to Information Act[21] *were cited. I find this argument to be totally misleading, inapplicable and irrelevant to the present case. The petition before the court is not expressed under the provisions of Article 35 of the constitution or Access to Information Act.*[22]*The authorities cited on this point are irrelevant to the present petition.*

Determination

The court was asked to strike the petition. Striking out a court proceeding is a drastic and draconian step that amounts to shutting out the door for a litigant and in my view it ought to be exercised carefully, with a lot of caution and ought to be used as a tool of last resort and in extremely deserving cases where the case in question is hopelessly bad, unsustainable and that the defect in question must be incurable. Madan, JA, (as he then was) put it succinctly in *DT Dobie Co Ltd vs. Muchina****[23]*** when he 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 week 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)*

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.[24] Also relevant is the dicta of Fletcher Moulton L. J. in *Dyson Vs. Attorney General****[25]***

> *".....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 were 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)*

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 week 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.

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.[26]

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. 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.[27]

Applying the principles laid down in the law and the above authorities, the conclusion becomes irresistible that the preliminary objection raised is this case has no substance in law and has no merits at all and therefore it is unsustainable. *I find myself unable to uphold the preliminary objection* and I dismiss it with costs to the petitioner.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **12th** day of **May** 2017

John M. Mativo

Judge

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[1] See paragraph 3.0 to 3.0 of the Petition

[2] Cap 80, Laws of Kenya

[3] Act No. 31 of 2016

[4] {1989}E.A

[5] Supra

[6] Counsel also cited Misc Civil App. No. 116 of 2015

[7] Supra note 4

[8] Supra

[9] Supra note 3

[10] Act No. 31 of 2016

[11] Ibid

[12] Legal Notice No. 117 of 28th June 2013

[13] {1969} E.A 696 AT PAGE 700

[14] **{2001} KLR 579; [2001] 1 EA 177**

[15] **Oraro vs. Mbaja [2005] 1 KLR 141**

[16] Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co. ISBN 9780899417073.

[17] *"Question of fact". Legal Information Institute. Cornell University Law School.*

[18] Supra

[19] Ibid

[20] Supra

[21] Supra

[22] Ibid

[23] [1982] KLR 1 at page 9:

[24] Dickson Karaba Vs. John Ngata Kariuki & Another {2010} e KLR

[25] {1911} KB 418

[26] Richard Nchapai Leiyangu vs IEBC & 2 others

[27] Agip Kenya Ltd vs Highlands Tyres Ltd {2001} KLR 630