



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO. 15 OF 2016

IN THE MATTER OF ARTICLES 20, 21, 22, 23 (3) & 40 OF THE CONSTITUTION, 2010

AND

**IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE PROPERTY RIGHTS
OF THE PETITIONER**

AND

IN THE MATTER OF THE KISII COUNTY FINANCE ACT, 2015

AND

IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010

BETWEEN

ASSOCIATION OF KISII BUSINESS COMMUNITY.....PETITIONER

VERSUS

THE GOVERNOR, KISII COUNTY.....1ST RESPONDENT

KISII COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

Background

1. On 9th May, 2016, the petitioner herein, who describes itself as an association registered under the Societies Act and as representing the interests of business people in Kisii County filed a petition against the respondents herein who are the Governor and Kisii County Government respectively.

2. The petitioner's claim against the respondents is that they have been levying charges against its members contrary to the provisions of the Kisii County Finance Act, 2015 by wrongly categorising small shops as medium shops and medium shops as large shops thereby imposing higher levies from the said members.

3. The petitioner's claim is that the unlawful actions of the respondents have infringed on their constitutional rights thereby necessitating the filing of the petition wherein the petitioner sought the following prayers:

- a. **Declaration be issued to the effect that the Petitioner is entitled to protection under the constitution.**
- b. **Declaration that the 1st and 2nd Respondents have no rights, mandate and/or authority to charge levies, fees, charges and rates higher than those provided for in the Kisii Finance Act, 2015.**
- c. **Declaration that the Petitioners actions of charging levies, fees, charges and rates that are higher than those provided for in the Kisii Finance Act is illegal and unconstitutional.**
- d. **An order of permanent injunction restraining the 1st and 2nd Respondents either by themselves, agents, servants and/or anyone claiming under the said respondents from charging fees, charges, levies and rates that are higher than those provided for in the Kisii Finance Act, 2015 .**
- e. **An order that the respondents refund all extra amounts paid to them by virtue of the inflated invoices and wrong classification of businesses.**
- f. **An order of damages/**
- g. **Costs of the petition be borne by the Respondents jointly and/or severally.**
- h. **The Honourable Court be pleased to issue such orders and/or writs as the court may deem fit and/or expedient.**

Petitioner's application

4. Concurrently with the petition, the petitioner also filed a Notice of Motion application under **Articles 20, 21, 22, 23 (3) and 40 of the Constitution, Sections 1A, 1B, 3A and 63 (c) and (e) of the Civil Procedure Act and orders 40 and 51 of the Civil Procedure Rules** seeking inter alia, orders of injunction to restrain the respondents from charging fees, levies and rates higher than those provided for under the Kisii County Finance Act 2015, pending the hearing and determination of the petition.

5. The petitioner also sought for a refund of all the excess amount of money paid to the respondents by virtue of charging fees, levies, and rates that are higher than those provided for by the Kisii Finance Act, 2015.

6. The application was supported by the affidavit of DAVID MORACHA, the chairman of the Petitioner, dated 9th May 2016 wherein he reiterates the contents of the petition and states that the respondents have wrongly categorized the petitioner's members businesses thereby leading to the charging of exorbitant levies that are not in tandem with the provisions of Kisii County Finance Act.

Respondents' preliminary objection

7. On 20th June 2016, the respondents filed a notice of preliminary objection to the petitioner's said petition and application on the following grounds:

1. **That the 1st Respondent are non-suited as parties to this petition.**
2. **That the petitioner has no capacity or locus standi to file the petition as the petitioner is not a legal entity capable of suing or being sued and therefore the petition is a non-starter.**

3. That the Petitioner has not exhausted the available mechanisms put in place by the 2nd Respondent for resolving disputes arising from the Kisii County Finance Act, 2015. The court should promote alternative forms of dispute resolution as envisaged in Article 159 (2) (c) of the Constitution.

Replying affidavit

8. The respondents also filed a replying affidavit to the application through Timothy Kambuni, the Director of Revenue for Kisii County Government. He deposes that the application is frivolous, vexatious and an abuse of the due process of court and ought to be struck out. He reiterates that the applicant has no locus standii to file the petition and application as it is neither a legal entity nor a natural person capable of sustaining a representative suit as it is non-suited to petition this honourable court.

9. The respondents aver that they have under the Kisii County Finance Act (2015) formed a complaints committee to expeditiously deal with and resolve cases of irregular billing and therefore the petitioner ought to have referred this case to the said committee instead of rushing to court. They contend that the instant petition has been presented prematurely before exhausting all the available mechanisms for dispute resolution, and the applicant is therefore undeserving of the orders sought:

Further affidavit

10. On 16th August 2016, the petitioner filed a further affidavit through its chairman David Moracha wherein he accused the respondents of deviating from the substantive matter before the court by raising objection to the petitioners capacity to file the petition yet the constitution guarantee locus to the applicant to file a suit in the interest of its members.

11. The petitioner reiterates that the 1st respondent has been properly enjoined in the petition in his capacity as the overall leader and chief accounting officer of the 2nd respondent.

12. When the application came up before me for hearing on 18th October 2016, parties agreed to canvass the preliminary objection first by way of written submission.

Petitioners submissions on the preliminary objection

13. Mr. Ochoki for the petitioner submitted that Article 23 (1) of the constitution grants this court the jurisdiction to hear and determine applications regarding the violation of rights under Article 20, 21, 22/23 (3) and 40 of the constitution. He reiterated that this court has jurisdiction to enforce rights under the Bill of Rights as provided for under chapter 4 of the constitution.

14. On the petitioner's locus standi to file the petition, the petitioner submitted that Article 22 of the constitution allows associations acting in the interest of one or more of its members to institute court proceedings.

Respondents' submissions

15. M/s Opini advocate for the respondents submitted that **Section 10 (g) of the Kisii County Finance Act** provides that complaints or disputes arising out of revenue levies be referred to the Budget and Appropriation Committee of the County Assembly for redress before being referred to the court of law for determination. He therefore contended that the petition was prematurely filed before this court.

16. On the petitioner's capacity to sue, the respondents submitted that a society can only sue through its officials and not in its own name.

17. Lastly, the respondents submitted that **Article 159 (2) (c) of the constitution** provides for the promotion of alternative dispute resolution mechanisms and therefore the petitioner ought to have

complied with **Section 10 (1) (g) of the Kisii County Finance Act, 2015** before filing the petition in court.

Analysis and Determination

18. The respondents preliminary objection raises 3 pertinent issues for determination namely:

- a. **Whether the 1st respondent is non-suited in this petition.**
- b. **Whether the petitioner is a legal entity capable of suing and being sued in its own names.**
- c. **Whether the petitioner needed to have exhausted all the available dispute resolution mechanisms before filing the petition in court.**

19. Whether the above issues fall under the bracket of matters that can be determined at a preliminary point can be determined by looking at the definition of a preliminary objection as was stated in the celebrated case of **Mukisa Biscuit Company vs Westend Distributors Ltd Limited (1969) EA 696 at page 701** which case was cited by the Court of Appeal in the case of **Nitin Properties Limited vs Jagjit Singh Kalsi & Another** as follows:

"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."

20. Going by the definition of the preliminary objection as stated in the **Mukisa case** (supra) I am of the view that the issue of whether or not the 1st respondent has been properly sued in this case or whether the petitioner has capacity to sue in its own names or if all the available dispute resolution mechanisms had been exhausted are matters of evidence which will require that the court to ascertain certain facts before making a determination. I find that as far as the name and description of the petitioner and the 1st respondent are concerned, even if there could be an error in the said names, the same cannot be said to constitute pure points of law which have an effect of fully and finally determining the issues between the parties as the said names or descriptions can still be amended. A similar issue arose in the case of **Gailey & Roberts Limited vs Krishna & Sons Ltd**: wherein it was held:

"Accordingly, where there has been a bona fide mistake either of law or fact in commencing a suit in the name of a wrong person whether as Plaintiff or as Defendant, the court ought to allow the amendment rather than put the parties to the possible expense of a fresh suit. The mistake must be a bona fide mistake, such a where the party intends to sue the right person but, by a slip of the pen, a word is left out and a wrong name is given or if the title used is hat of a non-existing person or if the Plaintiff was under any reasonable misapprehension and the error result in a misnomer. A bona fide mistake made foolishly or carelessly but honestly is curable by amendment. It is not excluded from being a bona fide mistake merely because it was a result of negligence."

21. In the matter of **Kenya Union of commercial, Food and Allied Workers -vs- Water Resource Management Authority & Another (2015) e KLR** the court was of the view that

"-----a preliminary objection if not properly applied is a dangerous tool of operation, that it can lock out deserving litigants out of their causes, but on the other hand it could condemn deserving respondents to undue pressure and costs in pursuing undue litigation."

22. My humble view is that preliminary objections should only lie on pure points of law not capable of being corrected by amendments. Preliminary objections were not intended to lock out or knock out opponents pleadings unnecessarily as if that was to be the case, then the objection would not entirely determine the issues between the parties but, only change the course of the case, which case can still resurface in another form or from another angle.

23. Turning to the issue of whether or not the petitioner had exhausted the dispute resolution mechanism before coming to court, once again, I find that this is not an issue of law, but of fact which will require the calling of evidence to establish if indeed Section 10 (1) of Kisii County Finance Act (2015) had been complied with. Besides the calling of evidence, I find that the said Kisii Finance Act [2015] does not supercede the provisions of the constitution which at Article 22 gives every person the right to institute court proceedings claiming that a right or a fundamental freedom under the bill of rights has been denied, violated, infringed or is threatened as is the petitioners claim in the instant case.

24. In light of the above findings and observations, I am inclined to dismiss the preliminary objection. Costs shall abide the outcome of the petition.

Dated, signed and delivered in open court this 19th day of July, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A Ochoki for the Petitioner
- Miss Nyaega for the Respondent
- Omwoyo court clerk