

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCLA E044 OF 2024

JOHN NYAOKO MOSE APPELLANT

VERSUS

WILFRED NTENGWA AMAYA RESPONDENT

JUDGMENT

(Being an appeal against the ruling of Hon. P.C. Biwott, Chief Magistrate, delivered on 11 November 2024, in the suit Ogembo MCELC No. E010 of 2024)

1. The appellant is aggrieved by the refusal of the trial Magistrate to allow his preliminary objection and has now preferred an appeal to this court.
2. The genesis of the suit was a plaint filed by the respondent on 16 April 2024. In the heading and body of the plaint, the respondent described that he was suing as Chairman of the Sacred Heart of Jesus Nyansara Catholic Choir Self Help Group. He averred that vide a sale agreement dated 16 February 2023, the appellant offered to sell the land parcel Majoge/Boochi/9156 measuring approximately 0.52 Ha at a consideration of Kshs. 1,000,000/=. It was pleaded that despite being paid in full, the appellant had failed to obtain the requisite consents and permits necessary to transfer the suit land. As a result he was issued with a 21 day notice which he failed to abide with and the contract was terminated. The plaintiff pleaded that he now claims a refund of the purchase price, and damages, being 30% of the purchase price in accordance with the penalty clause.
3. The appellant filed defence wherein he denied the contents of the plaint. He pleaded inter alia that the respondent has never been Chairman of the Sacred Heart of Jesus Nyansara Catholic Church Self Help Group (the Self Help Group) and does not therefore have locus standi to file suit on behalf of the Group. He also contended in addition, that the respondent has never been authorized by members of the Self Help Group to file suit on their behalf and therefore the suit is incompetent. Simultaneously with the defence, the appellant filed a notice of preliminary objection in the following terms :

- (i) That the plaintiff through its Chairman has purported to institute the proceedings on behalf of the Welfare Association without written authority to appear, plead or act on behalf of the members of the said Association in writing pursuant to Order 1 Rule 13 of the Civil Procedure Rules, 2010 and the suit is therefore a non-starter.*
 - (ii) That the Certificate of Registration of the plaintiff herein, on whose behalf the Chairman purports to institute the suit on its behalf, had expired as at the time the suit was filed and the same is yet to be renewed and therefore the plaintiff lacks capacity to institute the suit and the instant suit is fatally defective.*
 - (iii) That the verifying affidavit dated 7th March 2024 is defective in form and substance for being in variance with the plaint filed therewith, to the extent that one Wilfred Nteng'a Amaya admits at paragraph 3 of the affidavit that he instructed the firm of M/s Aboki Begi Advocates in his own individual capacity rather than on instructions of the Self-Help Group to file this suit.*
 - (iv) That in the circumstances, the plaintiff's pleadings and accompanying documents are incurably defective and ought to be struck out forthwith and this suit dismissed with costs to the defendant.*
4. From the proceedings, I see that the matter was before the trial court on 18 September 2024 with Mr. Mafumbo present for the appellant (as defendant) but with Mr. Begi, for the plaintiff, being absent. The court directed the parties to canvass the preliminary objection by written submissions and directed the matter to be mentioned on 9 October 2024 for a ruling date. On 9 October 2024, both counsel for the respondent (as plaintiff) and counsel for the appellant (as defendant) were both present and counsel for the respondent asked for two weeks to file submissions. The court directed a further mention on 16 October 2024. On that day only Mr. Begi, for the respondent, was present and he stated that he has filed his submissions. There was no mention regarding the submissions of the appellant. The court gave the ruling date of 11 November 2024 and ruling was duly delivered on that day.
5. In the ruling, the trial Magistrate mentioned that no submissions had been filed by the appellant and what he perused were the submissions of the respondent. He further mentioned that the preliminary objection dated 2 May 2024 was filed in a vacuum as there was no defence on record and that the defence dated 9 October 2024 was filed subsequently long after the

preliminary objection was raised. He held that the preliminary objection does not consist of pure points of law and whether the respondent had authority from members to bring the suit was a matter of evidence. He also held that whether the Certificate of Registration had expired was also a question of evidence. He therefore found no merit in the preliminary objection and proceeded to dismiss it. Leave to appeal was granted.

6. The appellant has appealed that ruling on grounds inter alia that the court erred in holding that the appellant did not file submissions; that the court erred in holding that the preliminary objection was raised in a vacuum; that the court erred in holding that the preliminary objection did not consist of pure points of law; that the court erred in holding that the issue whether the respondent had authority from the Group Members was a matter of evidence; that the court erred in dismissing the preliminary objection on grounds that the issue if the Group's Certificate of Registration was a question of evidence; that the court erred in dismissing the preliminary objection.
7. The appeal was argued through the written submissions of Mr. Mafumbo, learned counsel for the appellant, and Mr. Begi, learned counsel for the respondent. In his submissions, Mr. Mafumbo submitted that the Court Tracking System (CTS) shows that he filed his submissions on 1 October 2024 whereas the respondent's counsel filed his submissions on 14 October 2024 and that the court was biased in failing to consider his submissions. He acknowledged that the preliminary objection was filed before filing defence but averred that the court had raised that issue at the first mention and permitted counsel to file defence before the following mention date. He submitted that it was unjust for the trial Magistrate to revisit the issue of defence in his ruling yet he permitted the filing of the defence. On the issue of authority, he submitted that the respondent did not contest that he had no authority to file the suit and referred to Order 1 Rule 13 on the need for such authority. He relied on the authorities of *Kahindi Katana Mwangi & Another vs Canon Assurance (K) Limited (2013) eKLR* and *Wachu & Another vs Kenya Electricity Transmission Company Limited, Malindi ELC Petition No. E008 of 2022 (2023) KEELC 18348 (KLR) 22 June 2023 (ruling)*.
8. On his part, Mr. Begi, learned counsel for the respondent, submitted that the preliminary objection was not signed as required by Order 2 Rule 16 and is thus incompetent. He nevertheless supported the ruling of the trial court and he based his argument on the case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 696* where it

was held that a preliminary objection needs to constitute a pure point of law. He submitted that what was raised was not a pure point of law. He submitted that Sacred Heart of Jesus Nyansara Catholic Choir is a church and/or a religious organization which would be registered as a society under the Societies Act and which caters for the welfare of members through registered officials. He submitted that there was no dispute that the respondent is the Chairman of the Welfare Group with delegated powers to act on behalf of the welfare and represent the group in its activities. He relied on the case of *Veronica Wanjira Maringa & 26 Others vs ACK Buxton Diocese of Taita Taveta & Another (2022) eKLR and Makete & 6 Others (Suing for and on behalf of Elgon East Friends Church (Quarker Yearly Meeting) vs Lusweti & 5 Others (Environment and Land Case No. 10 of 2023) (2023) KEELC 17005 (KLR) (25 April 2023) (Ruling)*. He submitted that Order 1 Rule 13 deals with appearances of one litigant for others. He submitted that in this instance there is only one plaintiff known as the Sacred Heart of Jesus Nyansara Catholic Choir Self Help Group on whose behalf the respondent is suing and therefore Order 1 Rule 13 does not apply.

9. In his rejoinder, Mr. Mafumbo submitted that Order 2 Rule 16 does not impose restriction on where or how pleadings should be signed but nevertheless submitted that there was compliance with dating, signing, and who has made the document. He submitted that the preliminary objection was signed in the 'drawn and filed' section and that no application or grounds of opposition was filed to have the preliminary objection struck out. He submitted that this was an afterthought. He did not contest the authorities relied upon by Mr. Begi but submitted that it was paramount to determine the status of 'The Sacred Heart of Jesus Nyansara Catholic Choir Self-Help Group' and the position of 'Wilfred Nteng'a Amaya' in the group. He submitted that the record shows that the impugned group applied and was registered as a Self-Help Group under the Ministry of Labour and Social Protection, Department of Social Development, Gucha Sub-County. He relied on the authority of *Kipsiwo Community Self Help Group vs Attorney General & 6 Others (2013) eKLR* to urge that a Self Help Group cannot file suit in its own name as it has no legal personality. He submitted that Mr. Amaya had an obligation to avail the letter of authority under Order 1 Rule 13. He submitted that proceedings are null and void where a party has no locus standi.

10. I have taken note of all the above. I hold the following view :

11. I will start with the grounds that the trial court erred in finding that there were no submissions made by the appellant. It is of course contended that the submissions were duly filed on 1 October 2024. I have seen the submissions of the appellant in the record of appeal but there is no receipt. Without there being a receipt in the record of appeal, I cannot vouch as to whether or not submissions were filed on 1 October 2024 as contended. So as to allay any doubt that the submissions were indeed filed, what the appellant needed to do was provide a copy of the receipt and place it in the record of appeal, especially given that one of the grounds of appeal was that the court erred in not finding that the appellant had filed submissions. It is that receipt which would have demonstrated that indeed the submissions were filed as claimed. Without a receipt being annexed, I find it impossible for me to tell when, if at all, the submissions that I now see, were filed before the lower court. In absence of a receipt, I cannot find that the court erred in holding that no submissions were filed by the appellant.
12. The second issue is that the court erred in holding that the preliminary objection was filed in a vacuum as there was no defence when it was filed. On this, with utmost respect, the court went into error. A preliminary objection can be filed and/or raised even where no defence has been filed. Indeed, if it is an objection as to the legality of the suit, nothing would bar a preliminary objection for reason that no defence is filed. For example, assuming that a suit is filed without a verifying affidavit, the defendant can as well raise a preliminary objection that the suit as filed does not conform to the requirements of the law and should be struck out. That would be a genuine preliminary objection purely based on a point of law. It cannot be claimed that because one has not filed a defence then he cannot raise a preliminary objection in the suit.
13. The other grounds of the appeal are actually substantive and go to the root of the preliminary objection. The question is whether this was a true preliminary objection in the mould of a pure point of law, or whether it was an objection that invited evidence to be called, in which event then it would have failed the test of a preliminary objection as outlined in the case of *Mukisa Biscuit vs* where it was stated as follows by Law J.A at page 700 :
“So far as I am aware, 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.”

14. It will be seen from the above that a preliminary objection should be confined to points of law. Where evidence is to be invited then it will be improper to file a preliminary objection. Probably one could seek utility from Order 2 Rule 15 and proceed to file an application for striking out a suit and provide the evidence and reasons why the suit should be struck out. A preliminary objection is not a panacea for all issues that invite a striking out a suit. Indeed, in the same case of *Mukisa Biscuit Sir Charles Newbold, P*, bemoaned the practice of unnecessarily raising improper preliminary objections. He expressed himself as follows :

“The first matter relates to the increasing practice of raising point, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice must stop.”

15. Let us look at the preliminary objection. The first ground was that the respondent has purported to institute proceedings of a Welfare Association without a written authority pursuant to Order 1 Rule 13. The second ground was that the Certificate of registration of the Group had expired when the suit was filed. The third ground was that the verifying affidavit is defective. The fourth ground was that the pleadings are defective and should be struck out.

16. Straight away, it cannot be said that ground 2 was a valid preliminary objection. The claim that the Certificate of registration is expired could not be determined without the very certificate being presented. In essence, this would have called for evidence to be provided. It cannot thus be said that this was a proper preliminary objection. Ground 4 was a general ground, merely stating that the pleadings are incurably defective and should be struck out. There was really nothing in ground 4 to suggest why the suit should be struck out. That leaves only grounds 1 and 3 of the preliminary objection.

17. I am of opinion that ground 1, which pointed out the lack of a written authority, was a proper preliminary objection. This is because there was

pointed at the law i.e Order 1 Rule 13 and whether or not an authority was filed was a matter discernible from the manner of filing of the suit. I am also persuaded that ground 3, which questioned the legality of the verifying affidavit was also a valid ground for a preliminary objection. In fact, I opt to start my assessment with this ground 3. There is reference to paragraph 3 as bearing an averment that the respondent instructed the law firm of M/s Aboki Begi & Company Advocates in his own individual capacity. I think it is prudent that I copy the said paragraph verbatim. It is drawn as follows :

3. That I have instructed the firm of Aboki Begi & Co. Associates, Advocates, to act for me in this matter.

18. I think it will be splitting hairs to say that this paragraph means that the respondent was acting in his own capacity and not in a representative capacity. I agree though, that the verifying affidavit could have been drawn more elegantly and if the suit was a representative one, maybe state that the Self Help Group has instructed the counsel mentioned, but I would not go as far as striking out the suit because of the manner of drafting of this paragraph 3. I will leave it at that.

19. That narrows down the preliminary objection to ground 1, which is the argument that the suit is defective for want of a written authority as required by Order 1 Rule 13. Order 1 Rule 13 provides as follows :

(Order 1 Rule 13) Appearance of one of several plaintiffs or defendants for others

(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

20. The above rule applies where there are more plaintiffs than one. In such instance, it is necessary that a written authority, signed by the parties giving it, be filed with the suit.

21. But what is the situation that we have here ? Is it a situation of more than one plaintiff ? That will boil down to the nature of the entity that the respondent purported to represent. I have carefully gone through the plaint. The title of

the case describes the plaintiff as follows : ‘Wilfred Nteng’ a Amaya (Suing as the Chairman of the Sacred Heart of Jesus Nyansara Catholic Choir Self Help Group).’ Paragraph 1 of the plaintiff states that ‘the plaintiff is the Chairman of the Sacred Heart of Jesus Nyansara Catholic Choir Self Help Group and he brings this suit in his representative capacity on behalf of the said self-help group.’ Regrettably, the plaint does not proceed to describe this entity identified as Sacred Heart of Jesus Nyansara Catholic Choir Self Help Group. It does not say whether it is a registered Society, a limited liability company, a partnership, or a Self Help Group and if so registered under what Act of Parliament or under what Ministry. We actually cannot tell by reading the plaint what this Sacred Heart of Jesus Nyansara Catholic Choir Self Help Group is.

22. That was a huge omission in the plaint and a foul the provisions of Order 4 Rule 1 (b) which inter alia provides that the plaint shall contain ‘the name, description and place of residence of the plaintiff, and an address for service.’ We certainly do not have the description of this entity that the respondent purported to bring a suit on behalf of. That lack of description in my opinion may be fatal to a case because the defendant deserves to know who he is facing in the contest. He deserves to know whether he is facing a limited liability company, a partnership, a Society, or a natural person. There should be no guessing who the plaintiff is. As I have said, in our case the person that the respondent purported to bring a suit on behalf of is not described at all.
23. However, the objection before court was not on Order 4 Rule 1 and in fact nowhere in the preliminary objection was it raised that the entity that the respondent purports to represent is not described. I think in those circumstances, despite me flagging Order 4 Rule 1, it may be imprudent for me to make a conclusive determination on this issue at this appellate stage as it was not raised before the lower court. What was raised before the lower court was that the suit offended Order 1 Rule 13, i.e that it was a representative suit yet there was no authority. But without knowing the nature of the entity the plaintiff purported to represent, it was an impossibility in my opinion, to know whether the provisions of Order 1 Rule 13 applied or not. In his submissions, Mr. Begi stated that the entity is a Society. Mr. Mafumbo in his submissions said that the plaintiff is a Self-Help Group. Clearly the parties are not in agreement on this important fact. Without evidence, I am unable to tell which is which and I think that is the

situation that the court found itself. A preliminary objection is not the right path to take in instances of contested facts.

24. I think in the instance at play, what the appellant ought to have done was to file an application to strike out suit under Order 2 Rule 15 rather than file a preliminary objection. The use of Order 2 Rule 15 would have allowed him to present evidence. In fact, what happened in the case was a total irregularity. In his submissions in support of the preliminary objection, counsel for the appellant purported to annex certificates of registration, ID cards of purported members, and documents related to the entity considered to be the plaintiff. You do not present evidence in a preliminary objection, and even then, you cannot present evidence in submissions. Evidence is presented in form of an affidavit and if an affidavit is to be filed, then you need to file an application, not a preliminary objection.

25. I am thus unable to fault the trial court's conclusion that what was before court required evidence and was not a proper preliminary objection.

26. For the reasons above, it will be seen that I do not find merit in this appeal and it is hereby dismissed with costs.

DATED AND DELIVERED THIS 15 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Mafumbo for the appellant

Ms. Onchweri h/b for Mr. Begi for the respondent

Court Assistant – Michael Oyuko