



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 16 OF 2019

CHUKA IGAMBA NG'OMBE DEVELOPMENT ASSOCIATION.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF THARAKA NITHI.....DEFENDANT

RULING

1. This ruling concerns a Notice of Preliminary Objection filed by the firm of G. K. Kibira & Co. on behalf of the defendant/respondent which states:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE THAT the Respondent will raise objection in opposition to the plaintiff's application dated 23.7.2019 on the following grounds:-

1. The application has been brought by an unincorporated body with no legal personality to sue or be sued in its own name (No locus standi).
2. The persons giving the plaintiff/applicant authority to plead likewise have no capacity for the reasons that they were members of Chuka Centenary Celebrations Committee (4C's) NOT Chuka Igamba Ng'ombe Development Association, as sworn in paragraph 4 of the supporting affidavit MIN. 131/4Cs/2014 of the meeting held on 12th June, 2014 of the Chuka Town Celebrations Committee, annexure marked "CIDA 1(F).
3. There all annexures related to the minutes of Chuka Centenary Celebrations Committee (4 C's) and not the plaintiff/applicant.
4. The application and the entire suit is therefore fatally defective, without merit, and a gross abuse of the court process and should be dismissed with costs.

2. The Preliminary Objection was canvassed by way of written submissions.

3. The defendant's/proponents submissions are reproduced in full herebelow without any erasures or corrections whatsoever.

RESPONDENT'S WRITTEN SUBMISSIONS IN SUPPORT OF ITS

NOTICE OF PRELIMINARY OBJECTION DATED 29.7.2019

RESPONDENT'S NOTICE OF PRELIMINARY OBJECTION

The Defendant/Respondent's Notice of Preliminary Objection dated 29.7.2019 is based on the following grounds on points of law:-

- 1. The Application has been brought by Unincorporated Body with no legal personality to sue or be sued in its own name (No Locus standi).**
2. The persons giving the plaintiff/applicant authority to plead likewise have no capacity for the reasons that they were members of Chuka Centenary Celebrations Committee (4C'S) NOT Chuka Igamba Ngombe Development Association, as sworn in paragraph 4 of the Supporting Affidavit MIN.131/4Cs/2014 of the meeting held on 12th June 2014 of the Chuka Town Celebrations Committee, annexure marked " CIDA1 (F).

3. There all annexures relate to the minutes of Chuka Centenary Celebrations Committee (4 C'S) and not the Plaintiff/Applicant.

4. The application and the entire suit is therefore fatally defective, without merit, and a gross abuse of the Court Process and should be dismissed with costs.

Your Honour, the respondent reiterate all the grounds pleaded in the Notice of Preliminary Objection.

The plaintiff's advocates filed their response on 13.8.2019 served upon the defendant's advocates with the same on 15.8.2019.

It is on this premise of preliminary objection that we make our submissions and frame our issues as thus;

DEFENDANTS/RESPONDENTS SUBMISSIONS ON PRELIMINARY OBJECTION

(i) Whether the Plaintiff has locus standi to bring the application dated 23.7.2019 and the suit herein.

Your Honour it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach.

The question of proper parties is a very important issue which would affect the jurisdiction of the suit "in limine". ***In Housing Finance Co of Kenya Ltd V Embakasi Youth Development (2004) e KLR the court held that only juristic persons, that is, an entity endowed with legal personaliy can have locus standi before the court and can be the subject of the rights and liabilities as may be decided before the Court.***

It is our submission that the applicant cannot institute legal actions in its name because it is not a person or body corporate. A person under Order 1 rule 1 of the Civil procedure rules is either an individual or corporate entity and in this case the plaintiff is described as an association. The same position was held in the case of Simu Vendors Association V The town clerk city Council of Nairobi & Another (2005) e KLR.

Your Honour in *Living Waters Church International v City Council of Nairobi* the court pronounced itself on the legal status of registered societies to the effect that they were not legal personalities capable of being sued but through their officials or trustees as per their respective constitutions.

We urge this court to also pay respect to the celebrated case of *Baskins v United Mine workers (1921) 150 ARK.398,234 s.w 464 where it was held that there must be a statutory provision that permits a society to sue in its name for food reason, especially where the society comprises a large number of members. But that even where that happens it can only be by way of representative suit where only a few members would sue on behalf of the rest.*

Finally in the English decision of *Seely v Schenck & Denise quoted with Richarson v Smith (1885) 21 FLA 336,341 the court put it succinctly that a society or association is a number of persons taking to themselves a fictitious name and by that name they cannot appear in a court of justice. They can neither sue nor be sued by it. This is a privilege appertaining to corporate bodies only. The right to sue and be sued is a corporate franchise.*

On this limb of argument we humbly submit that the plaintiff has no locus to bring this suit and should be struck out at the earliest instance.

(ii) Whether the persons have capacity to plead on behalf of Chuka Igamba Ngombe Association as sworn in the supporting affidavit.

Your Honour the plaintiff under the guise of Chuka Igamba Ngombe association was purportedly the brain child of Chuka Town Centenary Celebrations Committee (4C'S) under the minutes "MIN 131/4CS/2014 on the meeting held on 12 th June 2014 in the plaintiffs/applicant supporting affidavit.

From a cursory reading of the said minutes it appears that the conversion of 4Cs was approved by the members but the proposed name was **CHUKA DEVELOPMENT ASSOCIATION (CDA)**. There are no further minutes in the plaintiffs pleadings to show how the plaintiff came into existence. This begs the question whether the member listed as giving authority to plead on behalf of the association have locus or are bonafide members of the plaintiff.

(ii) Whether there are minutes relating to the Plaintiff resolving to institute this Suit and authorizing its member to plead in this suit.

From the pleadings filed by the plaintiff it is outright clear that there are no minutes passed by the members of the alleged **CHUKA IGAMBA NGOMBE ASSOCIATION**. In the converse all the annexures in the pleadings relate to **CHUKA CENTENARY CELEBRATIONS COMMITTEE (4 Cs) AND not CHUKA IGAMBA NGOMBE ASSOCIATION**.

Your Honour this supports the Defendant/Respondent submission the plaintiff has no locus standi to bring this suit as well as the person said to be authorized to plead on behalf of the plaintiff.

iv. Whether the attaching of Certificate of Registration is of any evidential value or part of pleadings filed is procedurally proper at this juncture as per paragraph 4 of the Plaintiff's affidavit in response to the Defendant's Preliminary Objection.

Your Honour notwithstanding pleading of omission and/or failure to attach the Certificate of Registration at the time of filing the suit by the plaintiff, alleging an inadvertent omission regretted, that itself automatically renders the plaintiff's Notice of Motion and the entire suit also defective. The plaintiff made a fatal and incurable mistake, the said Certificate of Registration ought have been annexed to the Supporting Affidavit, and also in the plaintiff's list of documents at the filing of the suit. **The defendant cannot remedy that default and/or omission as in its response to the defendant's Preliminary Objection. The upshot of the matter is that there is no Certificate of Registration filed in the pleadings and should not be sneaked in at this juncture as that would only be tantamount to procedural impropriety (Notice of Motion and the Plaintiff) that notwithstanding its not aiding to cloth the plaintiff/Applicant with any legal personality to sue.**

The plaintiff has not amended the pleadings to include the Certificate of Registration either as an annexure to the application or List of Documents and cannot now turn around and file it in their response to the Preliminary objection. The same is unprocedurally filed and should be struck out.

In conclusion the application dated 23.7.2019 and the entire suit is fatally defective and should be dismissed with costs to the Defendant/ Respondent.

The Respondent will rely on the following authorities

1. **Housing Finance Co of Kenya Ltd V Embakasi Youth Development (2004) 2 KLR 548.**
2. **Simu Vendors Association v The Town Clerk City Council of Nairobi & Another (2005) Eklr.**
3. **Africa Orthodox Church of Kenya V Rev.Charles Omuroka & Lagos Ministry for Othodox Renewal Civil Case No 299 of 2013**
4. **Kipsiwo Community Self Help Group v The Hon attorney General and 6 others (E&L petition 9 of 2013.) Formerly HCC PET 10/2013.**
5. **Kiserian Isinya Pipeline Road Resident Association (KIPRRA) & 6 Others V Jamii Bora Charitable trust and Jamii Bora Charitable Trust Registered Trustees.**

Dated at Nyeri this 27th day of August, 2019

G.K.KIBIRA & CO.

Advocates for the Respondent

4. The plaintiff's written submissions are reproduced in full herebelow without any erasures or corrections whatsoever.

PLAINTIFF'S SUBMISSIONS

(In respect to the Defendant's Notice of Preliminary Objection dated 29th July, 2019)

May it please Your Lordship!

1. The basis/subject of these submissions is the Defendant's Notice Of preliminary Objection dated 29th July, 2019 in reaction to the Defendant's suit filed before this Honorable Court vide a Notice Of Motion dated 23rd July, 2019 for the orders thereof. The Notice of Preliminary Objection raises three (3) grounds upon which the defendant seeks the suit to be dismissed.
2. The Notice of Preliminary Objection is vehemently and duly opposed by the Plaintiff through its affidavit dated 9th August, 2019. This is because the purported Preliminary Objection by the defendant fatally fails to meet the strict standards and/or the established threshold for a competent Preliminary Objection. The purportedly presumed Preliminary Objection fails to constitute itself within the four corners of what may qualify as a Preliminary Objection.

A. BASIS OF THE APPLICATION

3. The Preliminary objected is based on the suit filed by the Plaintiff herein lodged vide a Notice of Motion dated 23rd July, 2019 seeking:
 - a. **THAT** pending interpartes hearing of the application herein this Honorable Court be pleased to issue interim Injunction orders restraining the Defendant herein either by themselves, their servants, agents proxies or by anybody whomsoever acting at their behest from in any manner whatsoever interfering with the Centenary Celebrations Monument erected at Chuka town, adjacent to the Gulf Petrol Station, the developments thereof and the grounds within which it is erected.
 - b. This Honorable Court do issue an order directing the defendant to restitute the said monument and the grounds thereof to their original state.

B. ISSUES FOR DETERMINATION

My Lord, we believe that the main issue for determination hereof is :

- i. Whether the Preliminary Objection herein raises a pure point of law.

C. The Law On Preliminary Objection

The *locus classicus* on Preliminary Objections is the now well established jurisprudence set in the East African Court Of Appeal case decision in Mukisa Manufacturing Co. Ltd –V- West End Distributors (1969) E.A.696 in which at page 700 Law JA. Stated that:

“...a preliminary objection consists of a point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

At page 701, Sir Charles Newbold added thus: “ *It (a preliminary objection) raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*”

In the said case Law.JA had this to say: “ The first matter relates to the increasing practice of raising points , 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 can not 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 issue. This improper practice should stop.”

A Preliminary Objection ought, therefore, be based on a pure point of law for it to gain subsistent grounding.

D. MAIN ISSUE IN GROUNDS FOR PRELIMINARY OBJECTION

My Lord, it is apparent that the issues that the defendant raises are mainly and essentially pegged on the question of the capacity of the Plaintiff to file the instant suit.

On whether or not the Plaintiff has capacity to institute the instant suit, we humbly submit that the Plaintiff has the requisite capacity to institute the suit herein-. This is, among others, by dint of the provisions of Articles 159 (2) (a) (d) and (e), 22 (2) (b), (c) and (d), 23, and 40 of the Constitution of Kenya, 2010.

E. AN ANALYSIS

My Lord, from the analysis hereabove, and looking at the grounds in the Defendant’s Notice of Preliminary Objection, it is clear the purported Preliminary Objection miserably misses the mark, and thereby fails the test of what may qualify as a credible Preliminary Objection.

In their Notice of Preliminary Objection, My Lord, the defendants have incidentally contested the capacity and legitimacy of the Applicant, thereby stating that the Plaintiff lacks requisite *locus standi*. This fact that is pleaded by the Applicant is contested and is available for ascertainment. By a dint of this dispute the defendant’s Preliminary Objection definitely falls on its own sword. It can not subsist.

Further, My Lord, the Defendant, in their grounds for their Preliminary Objection, have unwittingly raised issue with the ownership of the annexures to the minutes produced in the pleadings by the Plaintiff. This too renders the purported Preliminary Objection incapable of subsisting because it fails the test set in case law for a credible preliminary Objection.

F. THE DEFENDANT’S/RESPONDENT’S REPLYING AFFIDAVIT

My Lord, in the Replying Affidavit deponed by one FAITH KALUNDA KYUNGA dated 29th July, 2019, the deponent has averred to many issues most of which seem to be an effort to try to set the records straight, to defend and/or to exonerate the Defendant fro either any blame or culpability. In the process of so doing, My Lord, the defendant has further disputed most of the issues pleaded by the Plaintiff. In a way, My Lord, the Defendant has readily set the stage for full canvassing of the main suit. This clearly indicates there are issues that this honorable Court ought to look into and make a determination which is only possible by allowing the suit to proceed to substantive hearing and determination.

G. CONCLUSION

My Lord, from the foregoing and relying mainly from the standards set in established case law for a Competent Preliminary Objection, it is eminently evident that the defendant’s purported Preliminary Objection substantially and, therefore, fatally fails the simple test for a Preliminary Objection. It does not, by any stretch, meet the established threshold for a Preliminary Objection. If anything, My Lord, the only thing it achieves is to vindicate the assertion of “*the increasing practice of raising points , which should be argued in the normal manner, quite improperly by way of preliminary objection.*” And that...” ***The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.***”

As a consequence, My Lord, we urge that the defendant's Preliminary Objection herein be dismissed with costs and that the suit herein proceeds for substantive hearing and determination.

We humbly submit and pray, Your Lordship!

Dated at CHUKA this 9th day of August, 2019

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WAKLAW ADVOCATES

FOR THE PLAINTIFF

5. I frame the issues for determination in this Preliminary Objection to be:

- a) Does the plaintiff possess requisite legal capacity to institute this suit?
- b) Are the issues raised in the Preliminary Objection pure points of law?

6. I have carefully considered the pleadings, the written submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. I need not regurgitate the authorities proffered by the parties as the principles of law they enunciate are reproduced in full in their written submissions (op.cit).

7. By and large, the authorities proffered by the defendant are to the effect that entities which do not possess legal capacity cannot institute suits in courts of law. They are good precedents in their facts and circumstances. However, no two cases will be congruent to a degree of mathematical certitude in their facts and circumstances.

8. The one authority proffered by the plaintiff, Celina Wambui (Plaintiff/Applicant) versus Urithi Housing Cooperative Society Limited (Defendant/Respondent) quotes the celebrated case of Mukhisa Biscuits Manufacturing Co. versus West End Distributors (1969) E.A. 696 as having stated at page 70: "***A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication 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 a contract giving rise to the suit to refer the matter to Arbitration.***"

AND at page 701: "***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 facts are to be ascertained or if what is sought is the exercise of judicial discretion.***"

9. It is clear that, per se, associations formed under the Societies Act may not sue in their names but can sue through identified members. It is clear that Article 22 of the Constitution somehow expands the capacity of citizens to bring suits to canvass their rights; It states:

ENFORCEMENT OF BILL OF RIGHTS

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

10. The 2010 constitution directs courts to eschew procedural technicalities.

11. In the circumstances of this case, on 23rd July, 2019 3 members of the Plaintiff Association to wit, Isaac Mugo, Justin Kinyua Kathuru and Samuel Mutegi gave authority to Gitari Kea to appear, plead and or act on their behalf as the officials of the plaintiff Association. Unlike in the case of the cases proffered by the defendant, these are real persons. They do not hide behind a nebulous Association. They are pellucid that they have filed the suit on behalf of the plaintiff Association. Should they lose the case, they can be condemned to pay costs. Their only infraction is not to directly cite themselves in the plaintiff's pleadings. This is an infraction curable through invocation of the provisions of Article 159(d) of the Constitution Of Kenya, 2010 and deeming this infraction to be a procedural technicality. HOWEVER, had the 4 persons not come out clearly that they were representing the plaintiff in this suit, this would have been a different matter.

12. I answer the grounds in the Preliminary Objection as follows:

- a) Ground 1 – this ground is rather nebulous. In its exposition in the written submissions issues have been raised which invite arguments. The plaintiff argues that it has legal personality including identified members of the Association. It has also raised the question of if or if not Article 22 of the Constitution clothes it with authority to institute this suit.
- b) Grounds 3 and 4 by their nature pellucidly invite arguments which can only be satisfactorily canvassed during the full hearing of the suit.
- c) Ground 4 is rather general and is meant to buttress grounds 1 to 3 should they be upheld.

13. In the circumstances, this Preliminary Objection is dismissed.

14. I opine that the true answer to this suit, as in many other suits, is to fully canvass the apposite issues as quickly as possible in the main suit. As public funds are an issue in this suit, its hearing and determination should be prioritized.

15. Having perused the pleadings in this matter, I opine that there are commonalities in the positions the parties have taken. Both of them do not say that they do not want a monument. Their only difference arises regarding if the old monument should remain or if a new monument will take its place. They have no dispute whatsoever regarding the place where the monument should be placed.

16. Section 20 of the Environment and Land Court Act authorizes this court on its own motion to employ alternative dispute resolution methods in an attempt to resolve disputes. I opine that the issues in this suit can be resolved through an alternative dispute resolution method. I therefore direct that the parties subject themselves to an arbitration process to be chaired by the County Commissioner, Tharaka Nithi County, or his/her appointed representative within the next 14 days. Thereafter, the County Commissioner or his/her duly appointed representative shall file a report with court.

17. Should the parties decline to subject themselves to arbitration or should the issues emanating from this suit not be resolved within the period stipulated in paragraph 16 above, this court directs as follows:

- a) Parties will come to court on **6th November, 2019** to report on the progress of the apposite arbitration and for directions.
- b) The plaintiff is to fully comply with order 11, CPR **within 14 days of today**.
- c) The defendant is to fully comply with order 11, CPR latest by **19th November, 2019**.
- d) Extant orders are extended in terms of Section 63, CPA, pending hearing of any interlocutory applications directions of which will be given on **6th November, 2019**.
- e) Advocates representing the parties to contact the County Commissioner and to mutually agree on apposite modalities.
- f) The main suit will be heard on **3rd and 4th December, 2019**.

18. The court undertakes to deliver its judgment as soon as possible after close of hearing of the main suit.

19. Orders accordingly.

Delivered in open Court at Chuka this 22nd day of October, 2019 in the presence of:

CA: Ndegwa

Kirimi Muturi for the Plaintiff

G. K. Kibira for the Respondent

P.M. NJORGE

JUDGE