



**Republic v County Government of Kiambu & 3 others; Gitutu  
(Exparte Applicant) (Environment and Land Judicial Review Case  
1'B' of 2023) [2024] KEELC 793 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 793 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1'B' OF 2023  
JG KEMEL, J  
FEBRUARY 16, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KIAMBU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY COUNTY GOVERNMENT OF KIAMBU .... 2<sup>ND</sup>  
RESPONDENT**

**COUNTY EXECUTIVE FINANCE & ECONOMIC PLANNING COUNTY  
GOVERNMENT OF KIAMBU ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY ATTORNEY COUNTY GOVERNMENT OF KIAMBU .... 4<sup>TH</sup>  
RESPONDENT**

**AND**

**JEREMIAH KARIUKI GITUTU ..... EXPARTE APPLICANT**

**RULING**

1. Before Court is the Applicant’s Chamber Summons dated 13/1/2023 seeking Orders that;
  - a. Spent.
  - b. This Honorable Court be pleased to grant leave to the Applicant to apply for an order of Mandamus compelling the Respondents to pay the exparte Applicant herein the decretal sum, costs of the suit and interests totaling Kshs 345,600/= and to issue the title deed for Githunguri/Githiga/3694 to the Applicant.
  - c. Costs of the leave Application and the substantive motion be provided for.



2. The Chamber Summons is supported by grounds thereat and the Statutory Statement and Verifying Affidavit of Jeremiah Kariuki Gitutu, the Applicant. The grounds are that the Applicant is a Decree holder in SPM Githunguri ELC Case No 16 of 2020 whereby Judgment was delivered in his favour and the 1<sup>st</sup> Respondent herein was the 3<sup>rd</sup> Defendant in the suit. The 1<sup>st</sup> Respondent was ordered to inter alia process and issue title deed for L.R No Githunguri/Githiga/3694 and pay the Applicant Kshs 304,200/= . That the Applicant is old and frail and wishes to enjoy the fruits of his Judgment hence the instant Application to compel the Respondents to comply with the trial Court orders.
3. Opposing the Chamber Summons, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents raised a Preliminary Objection dated 16/3/2023 on the ground that they are wrongly joined in the Application in the light of the provisions of Article 226 Constitution of Kenya, Section 148 of the Public Finance Management Act (PFMA), Section 44 (3) of the County Government Act (CGA) and Section 10 of the Office of the County Attorneys Act.
4. In rebuttal, the Applicant filed Grounds of Opposition to the Preliminary Objection dated 27/3/2023. He stated that the Preliminary Objection is based on the wrong interpretation of the cited provisions to wit that Article 226 Constitution of Kenya does not preclude the Respondents as public officers from being accountable to the Court for disobedience for Court orders; Section 148 PMFA and Section 44 (3) CGA do not indemnify the 3<sup>rd</sup> Respondent for contempt of Court; the omnibus protection of Section 133 CGA applies to acts or omissions done by public officers in good faith which in itself is a question of fact to be integrated by the Court and therefore contrary to the principles set for Preliminary Objection in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Further that the Applicant has satisfied the provisions of Section 21 of the Government Proceedings Act in respect of the Judgment and Decree issued in SPM Githunguri ELC Case No 16 of 2020 and therefore the Preliminary Objection should be struck out with costs.
5. The Preliminary Objection is canvassed by way of written submissions.
6. The firm of Mwamba & Gitonga Associates filed submissions dated 15/5/2023 on behalf of the Applicant. A singular issue was drawn for determination; whether the Preliminary Objection is merited. Citing the case of *Mukisa Biscuits (supra)* and *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR, it was argued that the Preliminary Objection does not raise any pure point of law but the Respondents are simply trying to escape liability by invoking statutory provisions which do not avail any protection for blatant disregard of Court orders. That in any event if the Preliminary Objection was to succeed, the Judicial Review application would still survive against the 1<sup>st</sup> and 5<sup>th</sup> Respondents.
7. Conversely Legal Counsel Claireruth Nguru filed submissions dated 27/4/2023 on behalf of the Respondents. Similarly, the issue for determination according to the Respondents is whether the Preliminary Objection is merited. They answered in the affirmative. That as state officers they cannot be ordered to comply with orders that are beyond their mandate under the law. That parties cannot be added to introduce a new cause of action or alter the nature of a case. That the County Secretary, County Attorney and County Executive Member Finance are not accounting officers in the Lands Department to execute the Decree issued in the Githunguri case where the County Government of Kiambu was ordered to process and issue a title in favor of the Applicant in addition to paying him Kshs 147,500/= and costs of the suit.
8. Having considered the pleadings and rival submissions herein, the germane issue for determination in my view is whether the Preliminary Objection is merited.



9. The parameters for considering a preliminary objection are now well settled. A preliminary objection must only raise pure points of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“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.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 ...”

10. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose off the suit.
11. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents contend that they are wrongly enjoined in the Application and therefore it should be struck out. The question to ask at this point is whether the issue of misjoinder is a pure point of law. The answer can easily be traced in the Court of Appeal decision in the case of *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 others* [2016] eKLR where the appellants were aggrieved with the High Court Ruling that upheld a Preliminary Objection that impugned misjoinder of parties (Plaintiffs). The Appellate Court held as follows;

“We are of the considered view that the preliminary objections raised by the Respondents did not raise any pure point of law. By and large the Respondents dwelt on the character of the suit before the trial Court in terms of the number of parties involved. Of concern to the Respondents was the fact that each of the appellants had a separate and distinct claim. The Respondents were of the view that the said claims were deserving of separate suits and hearings as opposed to a collective hearing. Even if for a moment, and for arguments sake, we were to take the subject of misjoinder as a pure point of law, the veracity of the Respondent’s pleadings in this regard cannot be vouched for in the absence of a trial ...”

12. Flowing from the above, it is not in doubt that a Preliminary Objection impugning proper parties to a suit does not raise a pure point of law. The issue of joinder or misjoinder as the case may be is a question of fact. Order 1, rule 3 *Civil Procedure Rules* is to the effect that all persons may be joined as Defendants against whom any right to a relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.
13. Additionally, Order 1 Rule 9 *Civil Procedure Rules* provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In the event that



a party is wrongly enjoined in a suit, the Court is not powerless because Rule 10 sub-rule 2 provides that the Court can order the right person to be properly enjoined.

14. On the second limb of testing the merits of a Preliminary Objection, it can only be raised on assumption that all facts pleaded by the rival side are correct. The Respondents have disputed that they do not have capacity to comply with the trial Court orders and therefore the issues raised by the Applicant are disputed.
15. Thirdly for this Court to ascertain whether or not the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are wrongly enjoined, the Court has to call for evidence. The analysis of evidence itself would require hearing the parties formally thereby ousting the realms of a Preliminary Objection from being a pure point of law.
16. Lastly a Preliminary Objection cannot stand if what it seeks is a matter of judicial discretion.
17. The upshot of the forgoing is that the Preliminary Objection does not raise a pure point of law for the Court to determine. It is dismissed with costs in favour of the Applicant.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kirui HB Wahome for Applicant

1<sup>st</sup> – 5<sup>th</sup> Respondent/Judgment Debtor – Absent but served

Applicant/Judgment Creditor – Absent but served

Defendant - Absent

Court Assistants – Phyllis/Oliver

