



Mwembelegeza Community Residents v County Government of Mombasa & 3 others (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 4800 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024**

SM KIBUNJA, J

JUNE 19, 2024

**[1ST & 3RD RESPONDENTS' NOTICE OF
PRELIMINARY OBJECTION DATED 10TH APRIL 2024]**

BETWEEN

MWEMBELEGEZA COMMUNITY RESIDENTS APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

SECRETARY, COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

**DIRECTOR GENERAL FOR NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY (NEMA) 4TH RESPONDENT**

RULING

1. The 1st & 3rd respondents filed the notice of preliminary objection dated the 10th April 2024 raising one ground that leave to apply for judicial review orders was granted in ELCJR No. E001 of 2024, while the substantive motion was filed under ELCJR No. E002 of 2024; that as no leave was granted in ELCJR No. E002 of 2024, the application therefore offends Order 53 Rule 1 of the Civil Procedure Rules.
2. The court issued directions on 11th April 2024 for written submissions to be filed and exchanged. The learned counsel for the 1st & 3rd respondents and 2nd respondent filed their submissions dated the 19th April 2024 and 18th April 2024 respectively while the Applicant filed theirs dated the 20th April 2024, which the court has considered.
3. The following are the issues for the court's determinations:



- a. Whether the grounds on the preliminary objections raise pure points of law that if upheld, would determine this application.
 - b. Whether leave to file the application for judicial review orders was regularly sought, and obtained.
 - c. Who pays the costs in the preliminary objection?
4. The court has carefully considered the grounds on the preliminary objection, submissions by the respondents' counsel and applicant, superior courts' decisions cited thereon and come to the following findings:

- a. Preliminary objections were discussed in the case of *Hassan Ali Jobo & Another v Suleiman Said Shahbal & 2 Others [2014]* eKLR, in which the court cited the case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696, where the observed that:

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 issue, and this improper practice should stop”.

- b. In the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015]* eKLR the Supreme Court made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

- c. Order 53 Rule 1 of the Civil Procedure Rules provides that:

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) an application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and



the grounds on which it is sought, and by affidavits verifying the facts relied on.”

The applicant commenced this proceeding through the notice of motion dated the 31st January 2024, seeking for an order of mandamus. It is apparent from the contents in grounds 1 & 2 of the notice of motion and statutory statement and the depositions at paragraphs 15 & 16 of the verifying affidavit that prior to filing this proceeding, the applicant had sought and obtained leave from the court through ELCLJR No. E001 of 2024 to apply for the order of mandamus. It is therefore a fact that leave was applied for, and obtained in ELCLJR No. E001 of 2024, and not in the instant file, ELCLJR No. E002 of 2024, that the 1st & 3rd respondents have based their objection on. The leave granted in ELCFR No. E001 of 2024 has not been challenged todate.

- d. By its nature, the ground on the preliminary objection, of whether or not leave to apply for judicial review order of mandamus was sought and obtained, before filing the instant application raises a pure point of law that can be decided without calling evidence and if upheld, it can determine the notice of motion herein. However, leave to apply for the order of mandamus was sought and obtained, which fact was known to the counsel for the respondents. That upon granting the leave in ELCLJR No. E001 of 2024, that proceeding was finalised, and the court marked that file closed. The substantive motion for order of mandamus was the filed through a new file, ELCLJR No. E002 of 2024, which fact does not mean the order granting leave in ELCLJR No. E001 of 2024, ceased to have effect. All that would be required is for a certified copy of the order issued in ELCLJR E001 of 2024 to be filed in this file for posterity, and ease of reference. I therefore do not find any merit in the preliminary objection.
 - e. Having come to the above determination, then pursuant to section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, that provides that costs ordinarily follow the event, unless otherwise ordered for good cause, the 1st & 3rd respondents shall pay the applicant’s costs in the preliminary objection.
5. The upshot of the foregoing leads the court to find and order as follows:
- a. That the 1st & 3rd respondents preliminary objection has no merit and is rejected.
 - b. The 1st and 3rd respondents to pay the applicant’s costs in the preliminary objection.
- Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF JUNE 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Applicant: Mr Ainea Ragen

Respondents: No appearance.

Leakey – Court Assistant.

