



**Apuko, The Clerk County Assembly of Homabay v Ogaya, The
Speaker, County Assembly of Homabay & 2 others (Petition
E022 of 2024) [2024] KEELRC 2558 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2558 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E022 OF 2024
JK GAKERI, J
OCTOBER 23, 2024**

BETWEEN

**FAITH ADHIAMBO APUKO, THE CLERK COUNTY ASSEMBLY OF
HOMABAY PETITIONER**

AND

**HON JULIUS O OGAYA, THE SPEAKER, COUNTY ASSEMBLY OF
HOMABAY 1ST RESPONDENT**

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

COUNTY ASSEMBLY OF HOMABAY 3RD RESPONDENT

RULING

1. Before the Court for determination is the 2nd Respondent’s Notice of Preliminary Objection dated 22nd August, 2024 stating that the Honourable Court has no jurisdiction to hear the Petitioner’s application dated 22nd August, 2024.
2. Pertinently, the 2nd Respondent’s Notice of Preliminary Objection makes no reference to the reason(s) why this Court has no jurisdiction to hear and determine the Applicants Notice of Motion dated 22nd August, 2024, and none of the parties filed a response to the Notice of Preliminary Objection.
3. When the matter came up for hearing on 23rd July, 2024, the Court accorded the 1st and 3rd Respondents 7 days to file responses to the Petitioners Application. In addition, the Applicants Supplementary Affidavit dated 22nd July, 2024 was expunged from the record and the Court directed that the status quo be maintained until the application was heard inter partes on 1st October, 2024 to preserve the subject matter.



4. Finally, the Petitioner/Applicant was granted leave to file a Supplementary Affidavit. It is common ground that by letter dated 9th July, 2024, the County Assembly Service Board (CASB) of HomaBay suspended the Petitioner from employment on various allegations and was directed to handover vide letter dated 11th July, 2024.
5. The instant Notice of Preliminary Objection was precipitated by the Petitioners/Applicants Notice of Motion dated, 22nd August, 2024 seeking various reliefs including further conservatory orders to restrain the Respondent from undertaking disciplinary hearing and removing the applicant from office as Clerk of the County Assembly of HomaBay pending the hearing and determination of the petition, continued payment of salary and allowances to the Petitioner/Applicant, addition of all current members of the HomaBay County Assembly to these proceedings and their summoning to appear in Court to show cause why they should not be cited for contempt of Court, and punished among others.
6. When the matter came up for hearing on 1st October, 2024 Counsels confirmed that they had filed submissions and proceeded to make oral submissions. Regrettably, none of the Counsels had filed submissions according to the Judiciary Case Tracking System (CTS).
7. Mr. Nyamweya for the 2nd Respondent submitted that the Preliminary Objection was challenging the Courts jurisdiction to hear and determine the Petitioner's Notice of Motion on the premise that the disciplinary process commenced by the letter dated 8th August, 2024, was not subject to the Courts interrogation since the petition is grounded on charges contained in a letter dated 10th July, 2024.
8. According to Counsel, the Notice of Motion was introducing new charges not covered by the Petition and the Court has no jurisdiction as the Notice of Motion is made in a vacuum.
9. Counsel urges that the Court can only entertain matters that are before it and prays for dismissal of the application.
10. Mr. Mwamu on the other hand submitted that the Preliminary Objection was misplaced and bad in law as on 23rd July, 2024, the Court gave Orders for the preservation of the status quo pending the hearing and determination of the Notice of Motion only for the 2nd Respondent to issue a letter inviting the Petitioner/Applicant for a disciplinary hearing.
11. That the issues in contention are factual not legal as guided by the Court of Appeal decision in Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (1969) E.A 696. Counsel submitted that the Petitioners Notice of Motion seeks various reliefs and ought to be dealt with wholesomely and in any case the Preliminary Objection had not specified the law it was based on and the Court should address the totality of the case and make a determination and all issues canvassed in the petition.
12. Counsel submitted that the Petitioners Notice of Motion had not been responded to by way of a Replying Affidavit, an argument Counsel for the 2nd Respondent countered by arguing that he had filed grounds of opposition as a response Counsel urges that the Preliminary Objection be dismissed.
13. Finally, Mr. Nyamweya submitted that there was no application for contempt of Court and the Preliminary Objection was not premised on Section 77 of the County Government Act.



14. The singular issue for determination is whether the 2nd Respondent's Notice of Preliminary Objection meets the threshold of a Preliminary objection as laid down in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (Supra)*, where law J A was categorical 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 the contract giving rise to the suit to refer the dispute to arbitration.”

According to Sir Charles Newbold V.P;

“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 are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

15. The foregoing sentiments capture the 2nd Respondent's Preliminary Objection as it raises the question of the Court's jurisdiction to hear and determine the Petitioners Notice of Motion dated 22nd August, 2024.
16. However, the Notice of Preliminary Objection on record is reticent on the provision or proposition of law on which it is grounded, to clearly show that the Court has no jurisdiction to hear and determine the Petitioner's Notice of Motion.
17. Needless to emphasize, jurisdiction is everything as exquisitely captured by Nyarangi JA in *Owners of Motor Vessel "Lillian S" V Caltex Oil Kenya Ltd (1989) KLR 1*.
18. Similarly, in *Samud Kamau Machana & Another V Kenya Commercial Bank & 2 Others (2012) eKLR*, the Supreme Court of Kenya was unambiguous that

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction ad conferred by *the Constitution* or other written law...”

19. The 2nd Respondent's salient argument in support of the Preliminary Objection is that the Petitioner's Notice of Motion dated 22nd August, 2024 is grounded on the 2nd Respondent's letter dated 21st August, 2024 inviting the Petitioner to attend disciplinary hearing on 29th August, 2024. Noteworthy, the interdiction letter makes reference to the letter dated 8th August, 2024 Ref No. HBCA/LEG/VOL2/23; which tabulated three (3) allegations against the Petitioner and she responded vide letter dated 15th August, 2024. It is notable that the 2nd Respondent's letter dated 21st August, 2024 was prepared and served on the Petitioner after the directions given by the Court on 23rd July, 2024. This is the furthest the Court is prepared to go on this aspect of the ruling.
20. Having noted that the 2nd Respondent has not grounded its Preliminary Objection on any provision or proposition of law, and having further demonstrated that the 2nd Respondent's letters dated 8th August, 2024 and 21st August, 2024 are significantly inseparable, it is the finding of the Court that the 2nd Respondent's Notice of Preliminary Objection dated 22nd August, 2024 does not meet the threshold established in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (Supra)*, is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 23RD DAY OF OCTOBER, 2024



DR. JACOB GAKERI
JUDGE

