



Njeru Nyaga & Company Advocates v Thome V Residents Welfare Association (Environment and Land Miscellaneous Application E039 of 2021) [2025] KEELC 3558 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 3558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E039 OF 2021
JG KEMEL, J
JANUARY 30, 2025**

BETWEEN

NJERU NYAGA & COMPANY ADVOCATES ADVOCATE

AND

THOME V RESIDENTS WELFARE ASSOCIATION CLIENT

RULING

1. Njeru Nyaga & Co. Advocates LLP, sought to execute for recovery of its Advocate/Client costs that were assessed by the Taxing Master in accordance with the Decree issued on 17/4/24.
2. On 16/10/24, the Applicant took out a Notice to Show Cause Why Execution should not issue against: Arthur Chege, David Njuguna and Kimani Mbugua Maguta (in their Capacity as Officials of Thome V Residents Welfare Association) for arrest and Committal to Civil Jail.
3. It is the service of the above referenced Notice to show cause that has triggered the Preliminary objection, the subject of this Ruling.
4. The objection is expressed to be brought under the provisions of Order 49 Rule 5 of the Civil Procedure Rules on the grounds that;
 - a. They (officials of the respondent) are at all times officers of the said Society and did not incur the debt in their personal capacity or at all.
 - b. The appropriate mode of execution is an inquiry into the Society's asset not the enforcement against the officials by threatened attachment(sic) of them personally.
5. Mr. Kimani Mbugua filed an affidavit to the objection on his behalf and that of the two officials cited above. That they are officers of the respondent elected by members and exercise duties assigned to them in the Society's Constitution. That there is no provision in their Constitution that obligates them to



bear personal liability for the debts of the Society. That what they can do is to disburse funds on behalf of the Society if such funds are available.

6. The deponent contends that the notice served upon them is an overreach and an attempt to intimidate them into assuming personal liability of the debt. That execution by arrest and civil jail is only appropriate where someone is personally liable. The court was urged to determine the appropriateness of this mode of execution before any further proceedings can be undertaken.
7. In response to the Objection, the applicant filed a Replying Affidavit sworn by Martin Njeru Nyaga on 28/11/24 and averred that he was instructed by the said Kimani Mbugua in the year 2012 to represent the respondent on the promise that the said Kimani Mbugua would ensure payment of his legal fees upon registering the new officials and reclaiming the public land measuring 3 acres and valued at Kshs 500 Million.
8. The Applicant avowed that upon successful completion of the brief, Kimani Mbugua, the Chairman of the Society advised the over 600 residents and plot owners in Thome V against settling his fees and indeed disparaged his character. He strongly believes that the officials are preventing the payment of his legal fees and hence the need to hold them personally liable for the debt as officials of the Respondent. He states that in the alternative, the officials should avail the residents who collectively owe the Advocate- Client fees.

Directions

9. The Court directed that the objection be canvassed by way of written submissions. Both parties complied. The respondent's submissions are dated 5/12/24 whereas the applicant's submissions are dated 17/1/25.

The Written Submissions

10. In their submissions, the respondents submit that they were elected as Officials pursuant to the provisions of Section 9 of the Rules of the Society. They aver that their duties are donated by Section 10 of the Society's constitution. That the said constitution does not confer upon them the responsibility to use their own resources to bear the personal liability for the Society. They cited Section 40 of the *Civil Procedure Act* which provides for the arrest of Judgment-Debtor in execution of a Decree but not his representative. They argue that the proposed mode of execution is therefore not appropriate mode of execution and the court should find so.
11. They further assert that the inquiry that a Court makes once a Judgment –Debtor is summoned to show cause why they should not be committed to civil jail, relates to a Judgment- Debtor's means to pay. In this case, the Court was urged to consider the means of Thome V Society and not its officials.
12. It is also submitted that arrest and committal to civil jail ought to be used as a last resort after other modes of execution have failed. They cited the case of *Beatrice Wanjiku & another v The Attorney General & another* (2012) eKLR to that effect. The respondent submitted that the applicant has the option of having the officials subjected to examination of the judgement debtors properties and means of paying the decretal sum pursuant to Order 22 Rule 35 of the *Civil Procedure Rules*. They therefore assert that the court has the jurisdiction and discretion to find proposed mode of execution herein as inappropriate.
13. The applicant identified two issues for determination; The first issue is whether the Notice to Show Cause issued against the respondent is valid. Counsel submits that the Respondent not being a legal person capable of suing and being sued, it can only sue or be sued through its Office holders. He argues



that the Objectors having been officials at the time the instructions were issued, are liable to pay the Legal Fees owed to them. He avers that the Objectors have not provided any evidence to demonstrate that they lack the means to satisfy the Decree. Neither have they demonstrated any steps taken in trying to settle the Decree.

14. The Second issue for determination according to the Applicant is whether the mode of execution is lawful. The Advocate submits that issuance of warrants of arrest is a lawful and permissible mode of execution pursuant to Section 38 of the Civil Procedure Rules. The Notice to show cause having been issued after following the due process and the Judgment Debtor having failed to satisfy the Decree voluntarily, it was in order for the Applicant to seek issuance of the warrants of arrest. Consequently, the court was urged to find that the Notice to Show Cause is merited.

Issues for Determination

15. There are two key issues for determination; is the objection a pure point of law? If yes is it merited. Who meets the cost of the Preliminary objection?

16. The *Black's Law Dictionary*, 10th Edition defines a Preliminary Objection as;

“... an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”

17. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues 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...”

18. 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 of the suit. See the case of *David Karobia Kiiru v Charles Nderitu Gitoi & another* [2008] eKLR.



19. The Court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others*, Application No 50 of 2014, [2015] eKLR, succinctly reiterated this point when it stated that;

“ Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
20. The Apex Court in the case of *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) observed that a 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.”
21. In this case the objection is summarized as; whether the officials of the Society can be held liable for the debts of the Society and secondly which mode of execution between the Notice to show cause preferred by the applicant and an inquiry into the assets of the Society is appropriate in the circumstance to satisfy the decree.
22. It is noted that at this point the applicant has a decree in his favour issued on the 17/7/2024 and what remains is the satisfaction of the same by the judgment debtor.
23. The first limb of the objection, is whether the officials should be held liable for the debts of the Society. Their position is that at all times they were officers of the society and did not incur the debt, presumably the legal fees to the applicant, in their personal capacity or at all. Further that the appropriate mode of execution has not been preferred by the applicant which includes inquiry into the assets of the Society.
24. It is trite that a Society is an unincorporated entity without legal capacity to sue or be sued. It then acts and thinks through its elected officials who are put in office by the members of the Society to act on their behalf.
25. The applicant has given an explanation how his services were procured by one Kimani Mbugua who was and is the current Chairman of the Society on the promise that he would ensure payment of his fees is made on conclusion of the work which revolved around the registration of the officials of the society and the recovery of land.
26. For the court to make a merited conclusion on the two limbs of the objection, it will be called upon to consider the constitutive instruments of the Society as to the powers obligations of the officials vis a vis the liabilities of the Society. Also the question as to whether the Society has other assets that may be applied in the satisfaction of the debt due to the applicant is a factual one that calls for consideration of evidence.
27. Taking this route of examining documents runs a foul the principles with respect to what a pure point of law entails. It ousts the objection from being a pure point of law.



28. In arriving at this conclusion the court is guided by the decisions of the court in *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

29. Equally in the case of *Oraro v Mbaja* (2005) 1 KLR 141, it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

30. For the court to determine the veracity or otherwise of the respondent’s objection, it must call for and analyze evidence. Such analysis ousts the laid down parameters of a pure point of law. In other words, the Court finds that the preliminary objection is not founded upon a settled and crisp point of law. (*Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, Civil Application No 14 of 2014, [2014] eKLR).

31. Disposal orders

- a. Consequently, the Preliminary Objection dated 7/11/2024 is deemed incompetent.
- b. It is for struck out with costs to the Applicant.

32. Orders accordingly

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2025 THROUGH MICROSOFT TEAMS.

J G KEMEI

JUDGE

