



**Gakundu Farmers Co-operative Society v Board of Trustees Commodities Fund & 3 others (Civil Case E001 of 2025) [2025] KEHC 3791 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL CASE E001 OF 2025  
RM MWONGO, J  
MARCH 26, 2025**

**BETWEEN**

**GAKUNDU FARMERS CO-OPERATIVE SOCIETY ..... APPLICANT**

**AND**

**THE BOARD OF TRUSTEES COMMODITIES FUND ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF AGRICULTURE & LIVESTOCK DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**LEGACY AUCTIONEERING SERVICES ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. What is for determination herein is the 3<sup>rd</sup> defendant/respondent's preliminary objection dated 23<sup>rd</sup> January 2025. It was filed in opposition to the application dated 17<sup>th</sup> January 2025 by the plaintiff/applicant. The preliminary objection is premised on the following grounds:
  1. That the application expressly offends the provisions of section 16 of the [Government Proceedings Act](#);
  2. That the application expressly offends the provisions of Order 29 Rule 2(2) of the Civil Procedure Rules, 2010; and
  3. That the suit expressly offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010.



## The application

2. Through an application dated 17<sup>th</sup> January 2025 filed before the ELC, the applicant sought the following orders:
  1. That this application be certified urgent and the same be heard ex-parte in in the first instance.
  2. That a temporary injunction do issue restraining the Respondents either by themselves, their agents, servants or anybody claiming through them from offering for sale, selling by public auction the Applicant's land parcel numbers Ngandori/Kirigi/1673 and Ngandori/Kiriari/1864 on 30<sup>th</sup> January 2025 or at any 'other time thereafter and from disposing of, alienating, transferring and or in any other way dealing with the said properties, pending the hearing and determination of this Application interpartes.
  3. That a temporary injunction do issue restraining the Respondents either by themselves, their agents, servants or anybody claiming through them from offering for sale, selling by public auction the Applicant's land parcel numbers Ngandori/Kirigi/1673 and Ngandori/Kiriari/1864 on 30<sup>th</sup> January 2025 or at any other time thereafter and from disposing of, alienating, transferring and or in any other way dealing with the said properties, pending the hearing and determination of the main suit.
  4. That costs of this application be provided for.
3. The ELC Judge considered that application and noted that the issues therein stem from a charge instrument. Accordingly, the file was transferred to this court for hearing of the application since it was a commercial dispute and not a land dispute.

## Submissions.

4. This Court directed that the preliminary objection be canvassed by way of written submissions. Parties complied.
5. In support of the objection, the 3<sup>rd</sup> respondent submitted that the application contravenes section 16 of the *Government Proceedings Act* which prohibits injunctions against the Government. That Order 29 Rule 2(2) of the Civil Procedure Rules limits issuance of certain remedies against the government while Order 2 Rule 15 allows for striking out of pleadings for being frivolous or vexatious. The A.G argued that the preliminary objection meets the requirements laid down in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at 700.
6. Reliance was placed by the A.G on the case of *Margaret Mbiyu v Minister of Lands & 2 others* [2011] KEHC 4331 (KLR) where the court emphasised that an injunction cannot be issued against the government or government agency. Reliance was also placed on the cases of *Alamin Sheikh Ahmed v Registrar of Lands Kilifi County* [2022] KEELC 946 (KLR) and *Stephen M'Ikiamba & 4 others v John Kirimana Ikabu & 2 others* [2021] KEELC 182 (KLR) to buttress its argument. It was argued that the suit is a waste of the court's time and it should be dismissed.
7. On its part, the applicant argued that the preliminary objection does not meet the threshold set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra). That the issues raised in the preliminary objection are not pure points of law as the case should be. It was argued that the issues raised require the court to inquire and examine the pleadings. That a determination of the preliminary objection requires a factual examination in light of Order 29 Rule 2(2) of the Civil Procedure Rules and on whether an injunctive relief can be issued. It argued that the preliminary objection is misconceived



and it should be dismissed. It urged the court not to strike out the suit as an elaborate course of action has been disclosed. It relied on the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR) and urged the court to dismiss the preliminary objection.

### Issues for determination

8. The only issue for determination is whether the preliminary objection has merit.
9. The merit or otherwise of a preliminary objection is determined by considering the nature of issues raised therein.
10. It is trite that a preliminary objection can only hold if raised based purely on legal issues. Additionally, the determination of those legal issues should have the overall effect of determining the primary suit if the preliminary objection succeeds. This was the position taken by the court in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (supra) the Court of Appeal held thus:

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of 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.”

11. The 3<sup>rd</sup> respondent, who is defending the suit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, argues that the orders sought through the application dated 17<sup>th</sup> January 2025 cannot be issued against the government or a government institution. This argument is based on section 16 of the [Government Proceedings Act](#) which is in Part III of that Act and provides:

“(1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that—

- i. where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
  - ii. in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.
- (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the



Government which could not have been obtained in proceedings against the Government.” [Emphasis added]

12. Further, Section 2 (3) of the Act which relates to Judgments and execution defines “proceedings against Government” as follows:

“ Any reference in Part IV or Part V of this Act to court proceedings by or against Government or to which the Government is a party, shall be construed to include a reference to court proceedings to which the Attorney General or any Government department, or any officer of the Government as such, is a party.”

13. From a perusal of the application in question, the applicant is seeking a temporary injunction against the respondents which are government organs represented by the Hon. Attorney General. The applicant has correctly argued that the preliminary objection should be determined based on facts. The facts pleaded seek an injunction against the respondents who are Government organs. A reading of the above cited provision of statute expressly forbids issuance of an injunction against the Government. This is strictly a question of law, and therefore, expressly meets the requirements in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (supra). The court does not need to gather issues herein from the facts but purely from the law.

14. This position is further buttressed by Order 29 Rule 2(2) of the Civil Procedure Rules which expressly forbids issuance of an injunctive order against the government. It states:

“(2) No order against the Government may be made under-

- (a) Order 14, rule 4 (Impounding of documents);
- (b) Order 22 (Execution of decrees and orders);
- (c) Order 23 (Attachment of debts);
- (d) Order 40 (Injunctions); and
- (e) Order 41 (Appointment of receiver).”

15. The 3<sup>rd</sup> respondent stated that the application should be struck out for failing to raise a cause of action against the respondents. Order 2 Rule 15 of the Civil Procedure Rules provides:

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
  - (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.



### **Conclusion and Disposition**

16. The crux of the application by the applicant consists of the prayers for injunction against the state. Such a prayer against the Government can only be held to be frivolous and vexatious since it cannot be issued as specifically provided under the [Government Proceedings Act](#). Moreover, such a cause of action cannot arise against the Government. Where it is purported to be raised, it automatically fails and stands defeated.
17. Accordingly, the application herein must be struck out in the manner stipulated in Order 2 Rule 15 of the Civil Procedure Rules.
18. In the result, the preliminary objection has merit and is hereby upheld. The application dated 17<sup>th</sup> January 2025 is hereby struck out for the foregoing reasons.
19. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 26<sup>TH</sup> DAY OF MARCH, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Ndeke for the Applicant
2. Nyika holding brief for Kiongo for A.G
3. Francis Munyao - Court Assistant

