



**David Kerario Marwa t/a Kerario Marwa & Company Advocates v
Principal Magistrate’s Court, Ndhiwa & 2 others (Constitutional
Petition 1 of 2024) [2024] KEHC 4007 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION 1 OF 2024**

KW KIARIE, J

APRIL 25, 2024

BETWEEN

**DAVID KERARIO MARWA T/A KERARIO MARWA & COMPANY
ADVOCATES APPELLANT**

AND

PRINCIPAL MAGISTRATE’S COURT, NDHIWA 1ST RESPONDENT

REGISTRAR MAGISTRATES COURT 2ND RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 3RD RESPONDENT

RULING

1. The respondents herein filed a Notice of Preliminary Objection dated the 17th day of January 2024. It was based on the following grounds:
 - a. It is crucial to understand that a dissatisfied party with a judicial decision or order of a court of law can only challenge that decision or order through an application for review before the same court or an appeal to a higher court, with the other party being named as the respondent. This is the correct legal process, not through a constitutional petition naming the court as a respondent.
 - b. Naming the court, a respondent in a constitutional petition invites the court to appear and defend its decision or order before another court in a manner that is incompatible with our adversarial and hierarchical judicial system, where disputes are between the parties who come to court, and the errors of one court can be corrected by a higher court on appeal.
 - c. There exists a statutory right of appeal against the decision of the 1st respondent, and the grounds raised by the petitioner can be raised and addressed by that appeal.



- d. The petition is incompetent and a clear abuse of the court process. It is a collateral challenge to a merited judicial decision in Ndhiwa MCCC No.54 of 2017, dated and delivered on 27/4/2022, disguised as a constitutional petition.
 - e. The suit offends the doctrine of judicial immunity of the presiding magistrate, who enjoys immunity from being sued over actions done in good faith in the discharge of judicial functions.
2. The preliminary objection was opposed on the following grounds:
- a. That the preliminary objection is baseless.
 - b. That the issues raised do not fall within the purview of preliminary objection.
 1. A preliminary objection raises purely issues of law. The Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited* (1969) EA. 696 (Sir Charles Newbold P) observed as follows:

... 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 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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.
4. Upon my perusal of the preliminary objection and the submissions by the parties, I find that both issues of fact and law have been raised. To arrive at a fair decision, some facts must be ascertained.
5. I, therefore, find that the preliminary objection cannot be sustained. The same is dismissed. Costs shall abide by the outcome of the petition.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE.

