



**Ddaiddo & 2 others v County Assembly of Tana River & 2 others (Petition
E003 of 2023) [2024] KEHC 6172 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
PETITION E003 OF 2023
SM GITHINJI, J
MAY 30, 2024**

BETWEEN

**FRANKHEART J DDAIDDO 1ST PETITIONER
JAMES M ONCHAGA 2ND PETITIONER
YUSSUF I BORU 3RD PETITIONER**

AND

**THE COUNTY ASSEMBLY OF TANA RIVER 1ST RESPONDENT
TANA RIVER COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT
THE GOVERNOR, TANA RIVER COUNTY 3RD RESPONDENT**

RULING

- 1 For determination is the Notice of Preliminary objection dated 27th November 2023 brought on the following grounds;
1. That the petition and application as filed is legally incompetent, fatally and incurably defective, non-starter, an abuse of the court process and should be dismissed in limine with costs.
 2. That both the petition and application have been supported by a purported affidavit that offends the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya as well as Order 19 Rule 4 & 5 of the *Civil Procedure Rules* in the sense that: -
 - i. It has been sworn by one James M. Onchaga but signed and or deponed by one Frankheart J. Ddaiddo.
 - ii. It further violates the rule set out in *Renita Choda v Korir Kaput Rajput* Constitutional Petition No. E 406 of 2020 wherein it was held that illegally obtained



evidence is not admissible as long as it was obtained illegally and as such it was procured unconstitutionally.

3. That the application dated 17th May 2023 should be dismissed since it does not enumerate orders but make mere statement and is further not founded on grounds.
- 2 The court directed that the preliminary objection be disposed of by way of written submissions. At the time of writing this ruling, only the 2nd and 3rd respondents' submissions were on record. I have considered the submissions as well as the authorities relied upon. The issue for determination is whether the preliminary objection is meritorious.
- 3 The parameters of consideration of a preliminary objection are 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 vs. 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.”
- 4 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...”
- 5 In the case at bar, the 2nd and 3rd Respondents raise the preliminary objection on the validity of the supporting affidavit and whether the court can entertain a defective affidavit. A cursory glance at the affidavit, on its face, James M. Onchaga makes oath and proceeds to make the averments. At the end, the same is signed as having been deponed by Frankheart J.Ddaiddo. In my view thus, I find that the validity of an affidavit is a point of law and therefore the Preliminary objection is merited. Consequently, the preliminary objection is upheld and both the Petitioner's application and the petition are hereby dismissed with no orders as to costs. File is closed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 30TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the presence of; -

Ms Samena holding brief for Mr Shikanya for the 2nd and 3rd Respondents

Mrs Timna for the 1st Respondent

