



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 26 OF 2020

BETWEEN

1. ZAKY TRAVEL and TOURS LIMITED

2. HAYA SAFARI LIMITED

3. ABDULLAHI AHMED MOHAMED

4. ABDIAZIZ HAJI MOHAMED.....PETITIONERS

AND

1. HASSAN OLE NAADO

2. AMBASSADOR MOHAMED MAHAT

3. BAKARI CHEMASWET sued as the Legal representatives of

4. SUPREME COUNCIL OF KENYA MUSLIMS SOCIETY (SUPKEM)

5. MINISTRY OF FOREIGN AFFAIRS

6. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. This ruling is in respect to the Preliminary Objection dated 28/07/2020 filed by the 1st, 2nd, 3rd and 4th Respondent filed in Response to the Petition filed on 28/04/2020 and Notice of Motion application dated 16/04/2020 brought pursuant to Rule 2, 19, 23(1), (2) and (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Rule 3(2 & 3) of the High Court (Practice and Procedure) Rules.

2. The Notice of Preliminary Objection is premised on the following grounds:

a) THAT this Honourable court has no jurisdiction to entertain the Petitioners’/Applicants’ Notice of Motion and Petition dated 16th April 2020, as NO proper Constitutional Petition has been lodged before the court.

b) THAT by dint of Section 9(4) of the Fair Administrative Action Act, this Honourable Court is divested of jurisdiction as the Petitioners have not exhausted the dispute resolution mechanisms within the framework of the 4th Respondent, SUPKEM.

c) THAT there are Constitutional issues founding any justiciable claims before court.

3. On this Court's directions, the Notice of Preliminary Objection was dispensed with by way of written submissions. Counsel for the 1st - 4th Respondents **Mr. Kinyanjui** filed his submission on 29/9/2020 while **Mr. Hassan** learned counsel for the Petitioners filed submission 16/09/2020.

4. In urging this Court to allow the preliminary objection, Mr. Kinyanjui submitted that it a mandatory requirement under Rule 10(2) (f) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that a petition must be signed by the Petitioner or their advocate and in the absence of a signature on the petition, then there is no claim before the court available for adjudication or even determination. Counsel relied on the finding in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** where it was held that courts should never provide succor and cover to parties who exhibit scant respect for rules and timelines.

5. On the second ground of the preliminary objection, counsel submitted that the Petitioner has had not exhausted alternative dispute resolution mechanism established within the 4th Respondent itself.

6. Mr. Hassan learned counsel for the Petitioners, on the issue of the jurisdiction of this Court, submitted that Article 23(1) and Article 165(3) (b) of the Constitution mandates this Court to determine questions involving threats of violation, violations and or infringement of fundamental rights and freedoms and redress for the said violation. Counsel cited the finding in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others (2012) eKLR** where it was held that a Court could only exercise jurisdiction as conferred by the Constitution or other written law.

7. Counsel submitted that the matter at hand was a Constitutional Petition and not a judicial review; hence, Section 9(4) of the Fair Administrative Act does not apply in the instance.

The Determination

8. I have considered the **Preliminary Objection**. I have also considered the Petition in general, the rival written submissions, the cited authorities and the relevant provisions of law and decipherers the sole issue for determination as follows:

(a) Whether the Court has jurisdiction to determine the instant matter.

9. The Court will first determine whether what has been raised by the 1st -4th Respondents falls within the definition of a '**Preliminary Objection**' as stated in the case of **Mukisa Biscuits Manufacturers Ltd. v West End Distributors Ltd. [1969] E.A. 696**, where the Court held that: -

"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 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."

Further **Sir Charles Newbold** in the same case stated as follows:

"The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection. A preliminary Objection is in the nature of what used to be a demurer. It raises pure points 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 and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop."

10. **Ojwang, J** (as he then was) in **Oraro v Mbaja (2005) KLR 141** after quoting the statement of Law, JA in the Mukisa Biscuits

case (supra) went on to state that: -

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....”

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

11. The 1st -4th Respondents in their written submissions have raised the issue of jurisdiction. That this Court does not have **jurisdiction** to hear the case as filed by the Petitioners because the same is a nullity for failure by the Petitioners to sign the petition as required under Rule 10 (2) (f) of the *Mutunga Rules*. The Petitioners on the other hand have not rebutted the 1st -4th Respondents' contention. Having considered the issue, I find the same to be a pure point of law and falls within the rubrics of **Mukisa Biscuits case**.

12. Having found that the issue of jurisdiction falls under the category of issues that can be raised in the **Preliminary Objection**, the next issue for determination is whether the said **Preliminary Objection** is merited.

13. As correctly submitted by the Respondents, jurisdiction is everything and it has to be determined at the first instance. See the case of *The Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd 1989 KLR 1*, where the Court held that: -

“.... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

14. I have carefully perused the Petition filed 28/04/2020 and indeed, it is noteworthy that the same is neither signed nor dated by the Petitioners or their advocate on record. It is also noteworthy that there is a regular Affidavit in support of the Petition dated, signed, and sworn by Abdullatif Hussein Abdulrahman who is the 2nd Petitioner's director.

15. Pleadings are the cornerstone of any court proceeding and they are a bridge that a party must cross before approaching the court. The requirement to have a pleading signed is a mandatory requirement, and it is not a procedural issue; rather, it is a substantive issue that goes to the heart of the pleadings. The intent of the statute requiring the pleader or pleader's counsel to sign the pleading is to make a party signing or filing any of the pleadings take ownership and responsibility for the pleading's contents.

16. In **Atulkumar Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001** consolidated with **Vipin Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190** the Court of Appeal was of the following view:

“Where a pleading is not signed the same would be struck out rather than being dismissed...A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognised agent and this is meant to be a voucher that the case is not a mere fiction...The failure to sign the service copy of the statement of claim if the original is signed is not fatal...The position in England is that a pleading must be signed either by counsel or the party in person or the party's recognised agent...In Kenya where a record of appeal is signed by a suspended advocate who is an unqualified person is incurably defective and struck out...The position in India is that the failure to sign a plaint is merely a matter of procedure and the Court may allow a plaintiff to amend the plaint by signing the same...The object of the legislature in requiring that a plaint be signed by either the counsel or the party suing is to make the party suing or filing any other pleading take ownership and responsibility for the contents of the plaint or the pleading...In Kenya a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law”.

16. From the above authority, it is clear to me that, while procedural flaws should not be elevated to the level of a fascination in order to trump substantive justice, this Court is incapable of lawfully accepting such a substantive pleading as validly being on record. The Petition is not signed by either the Petitioners or their advocate on record and therefore this court has no hesitation in

declaring the unsigned Petition on record null and void for lack of signature.

17. Therefore, I find and hold that the undated petition filed on 28/04/2020 is a nullity, and hence the Notice of Motion dated 16/04/2020 lacks the legs to stand on. In the end, I strike out the Petition together with Notice of Motion dated 16/04/2020. Costs are in the discretion of the Court and since the Petitioner are licensed agents of the 4th Respondent, this Court makes no orders as to costs.

Orders accordingly.

DATED, SIGNED & DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Mwenje for Petitioners

Mr. Kinyanjui for Respondents

Ms. Peris Court Assistant



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