



**Hassan v Savage & another (Environment & Land Petition
E052 of 2022) [2023] KEELC 17155 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E052 OF 2022
EK WABWOTO, J
APRIL 27, 2023**

BETWEEN

AMINA MOHAMMED HASSAN PETITIONER

AND

PAUL JAMES SAVAGE 1ST RESPONDENT

MONA HUSSEIN ALI DUALE 2ND RESPONDENT

RULING

1. This ruling is in respect to the 1st respondent preliminary objection dated November 23, 2022 which sought for the Petition dated November 15, 2022 and application of the same date be struck out with costs. The Preliminary objection was premised on the following grounds:
 - i. That this court lacks jurisdiction to hear a matter that has been heard by the High Court and the Court of Appeal and a final determination made thereafter;
 - ii. This honourable court lacks jurisdiction to sit on appeal against the decision of the Court of Appeal in Court of Appeal at Nairobi, Civil Appeal No. 350 of 2017;
 - iii. The Petition and the Notice of Motion are barred by the res judicata rule;
 - iv. This honourable court also lacks jurisdiction by virtue of the doctrine of functus officio;
 - v. The Petitioner's claim, if any, is barred by the *Limitation of Actions Act* and is couched in terms of a Petition to avoid the same;



- vi. The Petition has not given the particulars of the alleged constitutional violations breached by the respondents in her Petition.
2. On November 24, 2022, the court directed that the preliminary objection be canvassed by way of written submissions. On the same day, the court took notice of an existing suit at the Court of Appeal Civil Appeal No. 350 of 2017 and directed that status quo would apply pending further directions from this court or further directions from the Court of Appeal.
3. On February 14, 2023, the 1st respondent was granted leave of 7 days to file supplementary affidavit limited to addressing the issue of immigration status of the 1st respondent as was raised by the petitioner.
4. The 1st respondent filed submissions dated December 30, 2022 in which it was averred that there are several undisputed facts that give strength to the preliminary objection. These facts include:
 - a. LR No1/1298 was a matrimonial property from the funds of the 1st and 2nd respondent.
 - b. The suit property was the subject matter of HCCC No. 50 of 2008 (OS) which was heard and determined and subsequently gave rise to Civil Appeal No. 350 of 2017 which was also heard and judgement delivered.
5. It was submitted that the petitioner failed to disclose that she filed two applications in Civil Appeal No. 350 of 2017, being a review of judgement and stay of execution dated July 8, 2022 and therefore she was well aware of her right of appeal. It was also argued that the petitioner never filed any claim to that property and if dissatisfied by the Court of Appeal decision she could appeal to the Supreme Court. Relying on the case of *Okiya Omtatah Okoiti & another v Attorney General & 2 others* [2015], it was submitted that the court lacked jurisdiction whether original, appellate or supervisory over matters by the Court of Appeal.
6. The 2nd respondent entered appearance vide the notice of appointment of Advocates dated November 22, 2022 by Garane and Somane Advocates but did not file any submissions.
7. In opposition to the preliminary objection, the Petitioner filed a Replying affidavit dated November 30, 2022 sworn by Amina Mohammed Hassan. It was averred that as an interested party in the Court of Appeal matter, she could not robustly challenge for her title which was erroneously divided between the Respondents as matrimonial property. It was also submitted that since she was not a substantive party to the proceedings, no orders could issue in her favour with regard to the suit property. Relying on the case of *David Gitau Njau & 9 others vs Attorney General* [2013] eKLR it was argued that previous decisions ought not to deprive the Petitioner from enjoying her constitutional right to property.
8. The Petitioner also filed their submissions dated January 31, 2023 in which she submitted that the supremacy of the Constitution supersedes any application of statutes of limitation. It was submitted that the two applications at the Court of Appeal were withdrawn for the main reason that a Constitutional Petition was the right way to protect and enforce the Petitioner's rights.
9. I have considered the preliminary objection, the rival affidavits, the written submissions and the authorities cited. In my humble view, the issue for determination is whether the preliminary objection is merited.
10. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukbisa Biscuits Manufacturing Co. Ltd V. West-End Distributors Limited* (1969). E.A 696. Having



raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.

11. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR highlighted the principle when it stated:

“...A Preliminary Objection 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...”

12. Section 7 of the *Civil Procedure Act*, reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated as follows: -

- i) The suit or issue raised was directly and substantially in issue in the former suit.
- ii) That the former suit was between the same party or parties under whom they or any of them claim.
- iii) That those parties were litigating under the same title.
- iv) That the issue in question was heard and finally determined in the former suit.
- v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

13. Firstly, the petitioner does not deny the existence of a prior High Court suit nor the suit in the Court of Appeal involving the parties. This is evidenced under Paragraph 21 of the Petition:

“...both the High Court and the Court of Appeal would fail to recognize that the Petitioner’s right, title and interest in the suit ought to be curved out ...”

14. In addition to this, the Petitioner portrayed acquiescence as to the applicability of the stare decisis principle in Paragraph 25 of the submissions:

“...My Lord, we are all well aware and do not dispute that Court of Appeal decisions are binding on the lower courts...”

15. Secondly, I have considered the participation of the Petitioner in previous proceedings. Paragraph 24 and 25 of the Court of Appeal judgement states:

“..... Vide an application dated 15th March 2019, the Interested party , Amina Mohammed Hassan motioned this Court seeking orders to be enjoined to this appeal as an Interested party, on grounds that she is the registered lessee of maisonette 2...The Application was allowed by consent order dated July 10, 2019...”

16. This court however disagrees with the submissions made by the Petitioner with regard to being an interested party and her averment of being restricted from participating in the Court of Appeal proceedings. The record shows that petitioner was represented by Mr Kimani Kiragu SC (Para 41)



at the Court of Appeal. The Court of Appeal elaborately laid out the interests of the Petitioner as a tenant (Para 86 and 91)

“... the lease agreement with the interested party grants her a long term lease of 99 years as a gift by virtue of her role as the mother and mother-in-law to the parties. It is a familial consideration of love and affection...the position taken by the respondent, that the leasehold is not matrimonial property can be said to be true but legally speaking and in the circumstances of this case, it would be unreasonable to allow the respondent and her family to benefit twice...”

17. The Court of Appeal equally pronounced itself as to the interested party’s position at Paragraph 93:

“...we think that the portion of land occupied by the interested party forms part and parcel of the matrimonial property....”

18. The petitioner did indeed get her day in court and after the delivery of judgement by the Court of Appeal, she willingly withdrew her application for review of the Court of Appeal judgement vide a Notice of Withdrawal dated January 24, 2023. The declaratory and injunctive orders sought in this Petition seeks to revive questions of ownership that have exhaustively been addressed by the High Court and the Court of Appeal.

19. With regards to the issue of costs, I take cognizance that the parties are close relatives and it is on this premise that I refrain from granting costs.

20. For this reason, I find the preliminary objection dated November 23, 2022 is merited and is hereby allowed under the following terms:

a. The Petition and Notice of Motion dated November 15, 2022 is hereby struck out.

b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Kyalo Mbobu for the Petitioner.

Dr. Kamau Kuria SC for the 1st Respondent

Mr. Nura for the 2nd Respondent

Court Assistant; Caroline Nafuna.

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