



Gathinji v Hinga & another; Kitonga (Interested Party) (Civil Appeal 22 of 2023) [2023] KEHC 27189 (KLR) (28 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 22 OF 2023
FN MUCHEMI, J
DECEMBER 28, 2023**

BETWEEN

PAUL KAMUNYU GATHINJI APPELLANT

AND

SAMUEL HINGA 1ST RESPONDENT

KENYATTA MEMORIAL FUNERAL HOME 2ND RESPONDENT

AND

SYLVIA M. KITONGA INTERESTED PARTY

RULING

Brief facts

1. This is a ruling for the 1st respondent's Notice of Preliminary Objection dated 11th October 2022 and his Further Notice of Preliminary Objection dated 8th December 2022 premised on the ground that the appellant's appeal and further affidavit dated 14th November 2022 contravenes Order XLI Rule 22(1) of the repealed Civil Procedure Rules which is a replica of Order 42 Rule 27(1) of the Civil Procedure Rules, 2010.
2. Parties disposed of the preliminary objection by way of oral submissions.

The 1st Respondent's Submissions

3. The counsel for the 1st respondent, Mr. Kinyanjui, argues that Order 42 Rule 27 of the Civil Procedure Rules bars a party from filing additional evidence on appeal. He further argues that the appellant has filed additional evidence in his Record of Appeal namely pages 1-16 which contains a Certificate of Urgency application dated 31/08/2022 whose supporting affidavit refers to a joint affidavit of marriage (page 16) and was produced in the trial court purportedly sworn by the deceased and the appellant.



Counsel further submits that the trial magistrate determined that the said affidavit was not sworn by the deceased as she did not append her signature to the said document.

4. Mr. Kinyanjui further states that the appellant abandoned the affidavit on page 16 which was not dated and was drawn by Ngumbau Mutua & Co. Advocates as it had an error and proceeded to file another affidavit. Furthermore, in the affidavit dated 9/9/2022, paragraph 17, the appellant took cognizance of the offence he committed on 31/8/2022 and admitted that affidavit drawn by Ngumbau Mutua & Co. Advocates in 2014 was not the correct affidavit and filed the correct affidavit of marriage annexed on page 91 in the Record of Appeal. The said affidavit was commissioned by Maingi Kamau & Co. Advocates on 12/05/2014. Mr. Kinyanjui argues that the said affidavit was sworn by the advocate in 2014 before he was admitted as an advocate of the High Court. As such, the affidavit was drawn and commissioned by an unqualified person and thus his acts are criminal in nature. Consequently, counsel prays that the appeal be struck out. Counsel further argues that the said states the joint affidavit is a new document which has been brought on appeal and is aimed at correcting the errors in the lower court. Counsel argues that the appellant is conspiring with his advocates to change records. Furthermore, the identification numbers of the appellant differ in the two affidavits as in the lower court the record shows Identification number 12985457 whereas in the High Court the number is 12925487.
5. Mr. Kinyanjui submits that the replying affidavit on page 84-86 was not in the lower court file as it has twenty five (25) paragraphs and was drawn by Maingi Kamau Advocate on 9/9/2022. Furthermore, the replying affidavit on page 64 is different in content and paragraph numbering from the one in the lower court. Counsel argues that the said affidavit was forged, altered and filed by the appellant and his advocate. Counsel contends that the correct Record of Appeal is the one filed by the Interested Party on 28th October 2022.
6. The counsel for the 1st respondent submits that page 42 of the record of appeal contains a letter dated 30/6/2022 addressed to Kenyatta University Teaching and Referral Hospital which is a new document brought on appeal and is meant to mislead this court that the appellant had married the deceased before her demise. Furthermore, the letter was authored by Mr. Maingi Kamau advocate and as of 30/6/2022, Mr. Ngumbau Mutua advocate was listed as one of the partners in the firm of Maingi Kamau & Associates Advocates. The date of the letter to the hospital is part of the fraud in that the deceased was admitted to the said hospital much later, that is on 8th July 2022. The letter was asking the hospital not to release the body of Shelmith to some people who were masquerading as her relatives. It also introduced the appellant as the lawful husband of the deceased.
7. Mr. Kinyanjui argued that the said advocates filed a further affidavit sworn by the appellant on 14/11/2022 without seeking leave of the court. Moreover, the said affidavit did not form part of the lower court record. Relying on the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Ltd [2020] eKLR, counsel for the 1st respondent argues that documents filed without the leave of the court ought to be struck out. Moreover, the law as provided in the case of Nayan Mansukhlal Salva vs Hanikssa Nayan Salva [2019] eKLR provides that additional evidence should not be admitted on appeal unless the applicant demonstrates exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. The court must give leave to admit such evidence before it is filed in court. The appellant and his advocate disregarded the provisions of the law.
8. The counsel for 1st respondent thus urges the court to release the body of the deceased to him and punish the appellant and his advocates by penalizing them to pay the mortuary fees and other expenses.
9. The counsel for the 2nd respondent, Mrs. Kitonga, supports the submissions by the 1st respondent.



The Appellant's Submissions

10. Mr. Gitahi, the appellant's counsel submitted that the preliminary objection is based on facts and not law and further that the record of appeal filed by Maingi Kamau advocate for the appellant contained numerous errors and should not be visited on the appellant.
11. Mr. Gitahi submits that he supports the preliminary objection to the extent that the new documents filed on appeal should be struck out. However, he submitted that the trial magistrate's ruling was not based on the new evidence introduced on appeal.
12. The counsel opposes the release of the deceased's body to the 1st respondent as he is a step brother to the deceased and has no locus in the matter. Mr. Gitahi further opposed the proposal of payment of the hospital bills and mortuary fees by the appellant and reiterates that the mistakes of an advocate ought not to be visited on the client. It was further submitted that the appellant had no objection to the release of the deceased's body to her relatives for burial and seeks the court's direction that parties be allowed to bury the deceased jointly.
13. The main issue for determination is whether the preliminary objection is sustainable.

The Law

Whether the preliminary objection is sustainable.

14. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696* is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....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.

15. Sir Charles Newbold P. stated:-

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

16. Similarly the Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* held that:-

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.

17. Further in the case of *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR* the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.



18. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.
19. The 1st respondent argues that the appellant has contravened Order 42 Rule 27 of the Civil Procedure Rules 2010 by filing additional evidence on appeal. Order 42 Rule 27 provides:-
 1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if-
 - a. The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. The court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,The court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 2. Whenever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.
20. I have scrutinised the documents in question that are alleged to have been forged by the appellant and his advocate Mr. Maingi Kamau. These include a joint affidavit of marriage sworn on 12th May 2014 and a further affidavit sworn on 14th November 2014. The affidavits were not part of the annexures to the pleadings before Ruiru Principal Magistrates Court in Civil Case No. E492 of 2022. It is evident that the affidavits have been introduced on appeal. I have perused the ruling of the trial court and noted on page 6 of its ruling it had considered the affidavit of marriage of 2014 and found it to be void ab initio. The court declared that in the absence of any evidence of marriage under Gikuyu customary law, the appellant could not prove marriage between him and the deceased. The affidavit in the appellant's record of appeal gives the wrong name of the deceased as Caroline Wamaitha Muriuki instead of Shelmith Nyaguthii Muturi. This is evidence of forgery in cutting and pasting.
21. The appellant has also altered his own affidavits that were tendered before the Magistrate's Court and included additional evidence. The new affidavits contain more paragraphs than the original one. The affidavits were drawn by Mr. Maingi Kamau advocate in 2014. He was not a qualified advocate by then. The certificate of admission produced in court shows that Mr. Maingi Kamau was admitted as an advocate on 24th May 2017 about three years after masquerading as an advocate. His number is P.105/13750/17. From the record, it is evident that the said counsel started practicing before he was admitted as an advocate. Through the said advocate, the appellant has filed additional evidence without the leave of the court.
22. I have looked at some of the grounds supporting the preliminary objection and note that they challenge the merit of the appeal and urge the court to strike out the said appeal. At this stage, going into the merit of the appeal is not in order for the reason that the court is not hearing the appeal but only dealing with the preliminary objection. It is my considered view that the 1st respondent's prayer for striking out the appeal may only be considered after this court has determined the merit of this preliminary objection.
23. Both parties have no objection to the release of the body of the deceased that has been lying in the mortuary for about one and a half years pending the determination of this appeal. However, the appellant is opposed to the body being released to the 1st respondent who is a step brother of the



deceased. It was submitted that the body ought to be released to the 1st respondent and the appellant jointly. Upon perusal of the ruling of the Magistrate, it is noted that she ordered that the body to be released to the 1st respondent after acknowledging his relationship with the deceased and considering the evidence before the court. Releasing the body to another person or to both the 1st respondent and the appellant jointly would be to absurd in the prevailing circumstances. This court would require to consider the evidence afresh, should this appeal see the light of day. I find that since there is no objection to releasing the body, the same should be released to the 1st respondent who is a close relative to the deceased as opposed to the appellant who did not prove existence of marriage between him and the deceased before the lower court.

24. Upon perusal of the ruling it is evident that the lower court condemned the appellant to pay the hospital and mortuary bills pending based on the reason that he has been the cause of the delay in the said suit. The delay was extended by filing of this appeal and as such, it is the appellant who ought to meet the said expenses.
25. In conclusion, I find the preliminary objection merited and it is hereby upheld in the following terms:-
 - a. That the orders made by Hon. J.A. Agonda in Ruiru Civil Case No. E492 of 2022 on 15th September 2022 are hereby upheld.
 - b. That this appeal is hereby struck out with costs to the 1st respondent for being misconceived and incompetent.
 - c. That the Director of Criminal Investigation (DCI) is hereby directed to investigate within 30 days the matter regarding the conduct and acts of Mr. Kamau Kennedy Maingi of Maingi Kamau & Associates Advocates and also the appellant in this appeal Thika HCCA No. 22 of 2023 Paul Kamunyu Gathinji and take necessary action as prescribed by the law.
 - d. That a copy of this ruling be served on the DCI Kiambu County by the Deputy Registrar of this court within 7 days.
 - e. That the Deputy Registrar do receive the report of the DCI and thereafter close this file.

It is hereby so ordered.

F. N. MUCHEMI

JUDGE

RULING DELIVERED AND DATED AT THIKA THIS 28TH DAY OF DECEMBER 2023.

