



**Strategic Urembo Sacco Society Ltd v Badawi; Meli (Interested Party) (Environment and Land Miscellaneous Application 56 of 2021) [2022] KEELC 13343 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13343 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 56 OF 2021  
NA MATHEKA, J  
SEPTEMBER 26, 2022**

**BETWEEN**

**STRATEGIC UREMBO SACCO SOCIETY LTD ..... APPLICANT**

**AND**

**HAIDER SULAYMAN BADAWI ..... RESPONDENT**

**AND**

**SHADIA MOHAMED KIPKORIR MELI ..... INTERESTED PARTY**

**RULING**

1. The applicant filed a preliminary objection dated May 17, 2022 that seeks to set strike out the interested party application dated March 11, 2022. Counsel submitted inter alia that the interested party does not have locus to file any pleading before court, on the grounds that her spousal consent was sought and granted before the charge was created in line with section 79 (3) of the *Land Act*, and that she lacks privity to the consent dated December 15, 2021.
2. The interested party responded to the preliminary objection with a replying affidavit dated June 30, 2022 sworn by Shadia Mohamed Kipkorir. She deponed that the preliminary objection was misplaced, untenable and a clear abuse of the court process. The deponent argued that the same cannot stand as the court is yet to decide on her prayer of being enjoined as an interested party to challenge a consent order which she deemed as illegal, unlawful and should be set aside on the ground that it was obtained through fraud and collusion. Further she contended that she has never consented to any charge neither has she signed any document to that effect.



3. The law on preliminary objection is now settled, it must be confined to pure points of law and not blurred by factual details, which may be disputed by the other party. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where it was 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. 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.

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 argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

4. I have noted that in the applicant’s submissions, counsel has relied on the supposed spousal consent that the intended interested party gave in compliance with section 79 (3) of the *Land Act* to contend that the court lacks jurisdiction to hear and determine her application. In my view, the applicant is inviting court to peruse, consider and make deliberations on the authenticity of the spousal consent. A preliminary objection must not be blurred by factual details liable to be contested and proved through evidence. I am in full agreement with the expression of Ojwang J, as he then was in *Oraro v Mbaja* [2005] I KLR 141, where he held that;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and 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. I am in agreement with learned counsel, Mr Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers’ weighty authorities carrying the message.”

5. The applicant is basing their objection on fact that the court needs to investigate whether the consent order dated December 15, 2021 legally precluded the interested party or not. Once the court has to retrieve back to facts, a preliminary objection cannot stand, since it cannot derive its foundation from factual information that can be tested by the evidence.
6. The essential claims in the preliminary objection have been objected by the intended interested party in her replying affidavit dated June 30, 2022. Where she argues that she is yet to be enjoined in the suit by the court and further refutes the claims that she consented to the creation of the charge. The intended interested party argues that the consent order was obtained through fraud and collusion and therefore cannot be the basis upon which the applicant purports to lock her out of its privity.
7. In response to the 1<sup>st</sup> respondent's notice of preliminary objection dated May 16, 2022 the interested party applicant stated that the notice of preliminary objection is misplaced, untenable and a clear abuse of the court process. The same should be dismissed with costs. That the application dated March 11, 2022 which she filed through her advocates on record on March 14, 2022, part of orders sought are that she be enjoined in the proceedings as an interested party and the honourable court is yet to determine



the said application following the filing of the notice of preliminary objection by the 1<sup>st</sup> respondent which has to be determined first. That, the respondents could not legally obtain a consent order which substantially affects her interests in the suit property. Therefore, the said consent order is unlawful and it should be set aside. That the documents annexed to the notice of motion application dated March 11, 2022 which she filed through her advocates on record on March 14, 2022 proves and establishes as follows that the suit property, CR 62863/1 (apartment no5, 5<sup>th</sup> floor on subdivision number: 16900) Original Number: 8822/3 section 1 Mainland North is matrimonial property wherein she reside with her two children (son-8yrs old and daughter-5yrs old) whose father is the 2<sup>nd</sup> respondent. There are ongoing proceedings before the Kadhi's Court, Mombasa in Petition No E184 of 2021 where she is seeking division of the matrimonial properties. This is a fact well within the knowledge of the 1<sup>st</sup> respondent's CEO Jared Matwetwe Ondwari, the 2<sup>nd</sup> respondent and the 2<sup>nd</sup> respondent's advocate one Hafidh Ogendero who had curiously signed the 1<sup>st</sup> respondent's pleadings, letters and was holding brief for the firm of Mutete John & Company advocates in the proceedings herein. That the said consent order was obtained through fraud and collusion as proved and established in the notice of motion application dated March 11, 2022 which she filed through her advocates on record on March

14, 2022 and the annexures thereof as follows; the 1<sup>st</sup> respondent's CEO Jared Matwetwe Ondwari is the 2<sup>nd</sup> respondent's witness in the matrimonial property proceedings MSA Kadhi's Court Pet No E184 of 2021. One Hafidh Ogendero, advocate who has signed all the pleadings and letters for the 1<sup>st</sup> respondent herein and was holding brief for Mutete for the 1<sup>st</sup> respondent is the 2<sup>nd</sup> respondent's advocate in the matrimonial property proceedings MSA Kadhi's Court Pet No E184 of 2021 (Shadia Mohamed Kipkorir Haider Sulayman Badawi) and the child maintenance proceedings in Tononoka Children's Court Case No 1241 Of 2021 (Shadia Mohamed Kipkorir vs Haider Sulayman Badawi). The said Hafidh Ogendero, advocate, the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent all acted in collusion to subvert justice and disenfranchise her of her proprietary rights over all that property know as property C R 62863/1 (apartment no 5, 5<sup>th</sup> floor on subdivision number: 16900) Original Number: 8822/3 Section 1 Mainland North. In the said proceedings Mombasa Kadhi's Court Petition No E184 Of 2021 orders were issued on the June 9, 2021 restraining any dealing of any nature whatsoever with the suit property C R 62863/1 (Apartment No 5, 5<sup>th</sup> floor on subdivision Number: 16900) Original Number: 8822/3 section 1 Mainland North pending hearing and determination of the petition before the Kadhi's Court. The proceedings herein are a fraudulent scheme by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in collusion with the 2<sup>nd</sup> respondent's advocate one Hafidh Ogendero aimed at rendering the proceedings before the Kadhi's Court nugatory and to disenfranchise the interested party of her proprietary rights over the suit property C R 62863/1 (apartment no 5, 5<sup>th</sup> floor on subdivision number: 16900) Original Number: 8822/3 Section 1 Mainland North. That there is no charge over the suit property CR 62863/1 (apartment no 5, 5<sup>th</sup> floor on subdivision number: 16900) Original Number: 8822/3 Section I Mainland North registered in favour of the 1<sup>st</sup> respondent and the said property has not been offered at all as security to any financial institution and/ or any other thereof. To further confirm that the present proceedings is a plan to evict her and her children from the house and have the same sold without giving her her share thereof, even after obtaining the said unlawful consent order, the 2<sup>nd</sup> respondent through his advocate Hafidh Ogendero, filed an application before the Kadhi's Court in MSA Kadhi's Court Divorce Cause No 88 Of 2020 (Shadia Mohamed Kipkorir Haider Sulayman Badawi) seeking to have her vacate the house for him to rent the same and generate income.

8. The records at the lands registry, Mombasa indicate that the only encumbrance registered against the suit property is a caution dated May 28, 2021 by the interested party claiming matrimonial property



beneficial interest. That the provisions of sections 75 and 80 of the Civil Procedure Act and orders 42 and 45 of the Civil Procedure Rules, 2010 deal with review and appeals respectively. That she has not filed any appeal and the application she has filed is under order 45 on review. Order 45, rule 1 provides that a party shall apply for review without unreasonable delay. That the said consent order as obtained and/ or issued on the January 27, 2022, however the same was served upon her through her mother after two months, that is, March 9, 2022. Immediately she instructed her advocates on record to file an application which they did on March 14, 2022. The said application was filed without unreasonable delay. Therefore, the allegations that the same is time barred are misconceived and aimed at misleading this honourable court. That order 45 of the Civil Procedure Rules, 2010 provides that a party may apply for review on grounds of discovery of new evidence, mistake or error apparent on the face of the record or any other sufficient reason. The application she filed is not limited to the ground of discovery of new evidence. The allegations by the 1<sup>st</sup> respondent are aimed at misleading the honourable court.

9. That the provisions of section 173(1) of the Insurance Act cap 487 cited thereof do not apply in the instant case as the said provisions deal with appeals from commissioner of insurance's decisions. That in response to ground number five of the notice of preliminary objection, she never consented to any charge and she never signed any documents to that effect. That she has every right to be involved in any negotiations which could have any impact on her proprietary interest over the suit property.
10. I find that the issues that ought to be determined in the application itself cannot form the basis of a preliminary objection. The applicant's preliminary objection is untenable for being founded on facts that need to be ascertained. I find that the notice of preliminary objection is not based on points of law but facts which are contested that will need evidence in terms of documents and witnesses' testimonies to prove. I find the preliminary objection is not merited and I overrule the same. The application dated March 11, 2022 is to be set down for hearing and the interim orders be extended till then.
11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

