



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gachanja v Ciira (Civil Appeal 197 of 2023) [2025] KEHC 6592 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA**

**CIVIL APPEAL 197 OF 2023**

**FN MUCHEMI, J**

**MAY 15, 2025**

**BETWEEN**

**JOHNSON MWANGI GACHANJA ..... APPELLANT**

**AND**

**GLADYS WAIRIMU CIIRA ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. Atiang Mitullah (SPM)  
delivered on 5th April 2022 in Thika CMCC No. 1101 of 2005)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the ruling of Thika Senior Principal Magistrate in CMCC No. 1101 of 2005 whereby the trial court dismissed the appellant's preliminary objection challenging the trial court's jurisdiction in the said case.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in failing to consider and appreciate that the appellant and respondent are husband and wife, a fact which is undisputed.
  - b. The learned trial magistrate erred in law and in fact in finding that the court had jurisdiction to determine the matter on matrimonial property.
  - c. The learned trial magistrate failed to appreciate 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.
3. Parties disposed of the appeal by way of written submissions.



### **The Appellant's Submissions**

4. The appellant submits that he and the respondent are husband and wife by cohabitation since the year 2000. The appellant further submits that they had one child and they both purchased land parcel number Ruiru West Block 1/584. The appellant submits that they lived on the suit property until the year 2005 when the respondent left after a disagreement. The appellant submits that he continued building and developing the land whose value has increased to Kshs. 20 million.
5. The appellant submits that he has filed Divorce Cause No. 43 of 2018 which is still pending and therefore the suit property which is matrimonial property cannot be distributed between them. The appellant further submits that the application dated 7<sup>th</sup> January 2022 was sub judice as similar issues were under trial in the divorce cause.

### **The Respondent's Submissions.**

6. The respondent submits that she filed an application dated 7<sup>th</sup> January 2022 where she sought among other reliefs the eviction of the appellant and the demolition of the structures constructed by him. The trial court delivered its judgment on 13<sup>th</sup> March 2015 directing the appellant to transfer ownership of land parcel number Ruiru West Block 1/584 to her. The trial court further dismissed the appellant's preliminary objection vide its ruling dated 5<sup>th</sup> April 2022 on the premise that the appellant had sought to overturn the judgment by way of a preliminary objection.
7. The respondent relies on the cases of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and Oraro v Mboga [2007] KLR 41 and submits that a preliminary objection raises a pure point of law and it cannot be raised if any fact has to be ascertained and thus in the instant matter the appellant's claim of matrimonial property has never been ascertained by any court of law and thus would need to be tested by the rule of evidence.
8. The respondent further submits that the issue of the matter being sub judice due to an ongoing divorce cause is misleading the court as the cause is yet to be finalized and the cause in no way identifies the property to be matrimonial property.
9. The respondent submits that the lower court had jurisdiction to give its orders on 5<sup>th</sup> April 2022 as it was enforcing her right to enjoy the fruits of her judgment delivered on 13<sup>th</sup> March 2015.

### **Issue for determination**

10. The main issue for determination is whether the appeal has merit.

### **The Law**

11. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

12. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-



An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

13. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
  - a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

#### **Whether the appeal has merit.**

14. The respondent filed an application dated 7<sup>th</sup> January 2022 seeking for orders of eviction of the appellant and demolition of the structures constructed by the appellant. In response to the said application, the appellant raised a preliminary objection dated 25<sup>th</sup> February 2022 challenging the jurisdiction of the lower court to deal with matter as the suit property is matrimonial property and the parties herein are husband and wife.
15. The case of *Mukisa Biscuits Manufacturing Ltd v 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.
16. 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.”
17. Similarly the Supreme Court in the case of *Hassan Ali Joho & Another v 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.”
18. Further in the case of *Hassan Nyanje Charo v 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.

19. It is trite law 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.
20. The appellant argues that the trial court did not have jurisdiction to entertain the application as the suit property is matrimonial property and the parties are husband and wife.
21. The law on the question of jurisdiction was enunciated in the case of Owners of the Motor Vessel “Lilian S” v Caltex Kenya Limited [1989] KLR 1 where the court held:-

“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.”

22. On perusal of the record it is evident that the judgment of Hon. M.M. Mutuku was delivered on 13<sup>th</sup> March 2015 declaring the respondent the owner of land parcel number Ruiru West Block 1/584 and also directed that the property to be registered in the name of the respondent. The trial court further found that the appellant was not entitled to the property. Thus, the appellant’s claim that the property was matrimonial was dismissed by the learned magistrate. The respondent was declared the proprietor of the suit property in the said case. The appellant never appealed against the judgment of the learned magistrate. Instead, he filed a preliminary objection attempting to overturn the judgment of the honourable magistrate. His claim was that the property was matrimonial in that he was married to the respondent. The magistrate Hon. Atyang Mitullah who heard the preliminary objection dated 28<sup>th</sup> February 2023 dismissed it for lack of merit in that the ownership of the property had already been determined by a competent court. In a ruling delivered herein by Ngetich J on 15<sup>th</sup> December 2022, the appellant was advised to appeal against the judgement of Hon, M.M. Mutuku which had determined the ownership of the suit property. The appellant did not file an appeal against the said judgment.
23. In my considered view, the raising of a preliminary objection in a suit where judgment had already been delivered rendered the said objection incompetent and misconceived. The court below had explained itself that a judgment could not be overturned through a preliminary objection and dismissed that objection.
24. Consequently, I uphold the ruling of Hon. Atiang Mitullah delivered on 28<sup>th</sup> February 2023 on the preliminary objection.
25. This appeal has no merit and it is hereby dismissed with costs.
26. It is hereby so ordered

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.**

**F. MUCHEMI**

**JUDGE**

