



REPUBLIC OF KENYA



SM v MG (Civil Appeal E026 of 2022) [2025] KEHC 10407 (KLR) (14 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E026 OF 2022**

JN KAMAU, J

JULY 14, 2025

BETWEEN

SM APPELLANT

AND

MG RESPONDENT

(Being an appeal from the Ruling of Hon Gavana A. Mohammed (SRK) delivered at Vihiga in the Kadhi's Court Matrimonial Case No 2 of 2019 on 21st September 2022)

RULING

Introduction

1. In his decision of 21st September 2022, the Learned Trial Kadhi, Hon Gavana A. Mohammed, Senior Resident Kadhi, allowed the Respondent's application dated 14th July 2022 to the limited extent of setting aside the orders of the Ruling dated 7th July 2022 that directed that the two (2) rooms on Plot No 1X at Jebrok Market be valued and disposed of and the purchase price be given to the Appellant. He directed that the same be substituted with orders that the Respondent give two (2) female cows of two (2) years each as her matrimonial property. He clarified that Orders (7), (8) and (9) in the Ruling dated 7th July 2022 would remain intact and ordered that each party bears its own costs of the application.
2. Being aggrieved by the said decision, on 17th October 2022, the Appellant herein filed a Memorandum of Appeal dated 13th October 2022. she relied on five (5) grounds of appeal.
3. In opposition to the said appeal, the Respondent filed a Notice of Preliminary Objection on 28th May 2024. It was of even date. He averred that the Appellant's appeal was bad in law since the errors leveled against the Trial Court as enumerated in the Memorandum of Appeal were dealt with and canvassed in Kakamega HCCA No 20 of 2020, notwithstanding other Judgments and Rulings as they were quashed in the circumstances.



4. He contended that the Appellant had failed to serve him with any directions from this court as required by law and that the Appeal had been mentioned more than six (6) times at the Deputy Registrar's court without clear direction from the High Court. He blamed the Appellant for failing to comply with the procedure of lodging appeals as it had taken a while since he was served with the Record of Appeal before the same was listed for directions before the Judge in Chambers.
5. He reiterated that the Appellant was wasting this court's time since all the Judgments referred to in his Memorandum of Appeal were quashed by the Judgment of Musyoka J in HCCA No 20 of 2020 and that no appeal had ever been referred to date. He pointed out that the subject matter herein had already been transferred to him by the former Respondent during his life time and after the divorce with the Appellant.
6. His Written Submissions were dated and filed on 6th December 2024 while those of the Appellant were dated 3rd February 2025 and filed on 7th February 2025. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

7. The Respondent submitted that the Appellant herein filed a case in Hamisi Kadhi's Court Civil Case No 46 of 2018 and Judgment was delivered against the former Respondent. He asserted that the being dissatisfied with the said Judgment which revoked her marriage certificate and ordered her to vacate Plot No 1X Jibrook Market within three (3) days, the Appellant filed an appeal in Kakamega HCCA No 125 of 2018 whereby Musyoka J ordered a retrial of the said case by a different Kadhi. The file was taken was given a new number Vihiga Kadhi's Court Matrimonial Cause No 2 of 2019.
8. He contended that after the re-trial, Hon D. S. Ratori, pronounced Judgment which validated the marriage between the Appellant and former Respondent allowing the Appellant to go back to Plot No 1X Jebrook which they were to share equally.
9. He asserted that being dissatisfied with the said Judgment, the former Respondent he appealed in Kakamega HCCA No 20 of 2020 whereby Musyoka J allowed the appeal limited to the extent of setting aside the order of the retrial court that directed the current Appellant to go back to residing at Plot 1X Jebrook Market allocating her half of the said Plot and transfer thereof. He added that Musyoka J validated the marriage between the parties and ordered the former Respondent to provide the Appellant with a residence whether by buying or renting one for her. He directed that the other orders in his Judgment remain in force.
10. He further submitted that the file was then returned to Kadhi's Court, Vihiga for purposes of execution. He stated that the former Respondent opted to rent a house for the Appellant by paying rent of Kshs 4,500/= shown in the Mpesa statement as having started on 2nd April 2021 until November 2021. He also he filed a divorce case in Vihiga Kadhi's Court Divorce Case No 1 of 2021 where the divorce was granted and marriage was dissolved.
11. He pointed out that the former Respondent continued to pay rent for the current Appellant but subsequently he died in the process. The family members went to court to inform the Kadhi about the passing of the former Respondent and the Kadhi advised for the substitution by any family member for the execution purposes since the case was already determined. He explained that was how he found himself in this matter.
12. He contended that he filed an application for substitution but instead of the Kadhi delivered a Ruling dated 7th July 2022 which was contrary to the one delivered by Musyoka J. He added that he applied to



review the said Ruling which Hon Kadhi Gavan A. Mohammed did in conformity with the Musyoka J's decision.

13. It was his contention therefore that this appeal was res judicata bearing in mind the decision that was delivered in Kakamega HCCA No 20 of 2020. He pointed out further that the appeal herein had contravened the provisions of Order 42 Rule 11 of the Civil Procedure Rules and Section 79 B of the *Civil Procedure Act*. He argued that there was delay in forwarding the file to the Deputy Registrar for directions to be given and that the file was only forwarded for directions after he filed his Preliminary Objection.
14. He placed reliance on the case of Hoystead & Others vs Taxation Commissioner (1925) where it was held that the admission of a fact fundamental to the decision arrived at could not be withdrawn and fresh litigation started with a view of obtaining another Judgment upon a different assertion of facts.
15. He argued that there were no new documents admitted in this matter and that the admission of the former Respondent's Death Certificate and Will did not interfere with the Judgment of Musyoka J but instead were produced with a view to bringing an end to litigation.
16. On her part, the Appellant opposed the Respondent's Preliminary Objection and submitted that the grounds thereon were premature, untenable and not supported by statutory provisions. She asserted that a Preliminary Objection must be on a pure point of law. In this regard, she relied on the case of Mukisa Biscuits Manufacturing Company Ltd vs West End Distribution Ltd (1969) EA 696 where it was held that a preliminary objection consisted of point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.
17. She argued that the Respondent had not raised a substantial point of law to warrant his preliminary objection to stand. She invoked Article 159(e) of the *Constitution* of Kenya 2010 and urged the court to find that her appeal had raised triable issues which ought to be determined on merit. She further cited the case of Oraro vs Mbasa [2005]eKLR where it was held that a preliminary objection was a point of law which must not be blurred with factual details liable to be proved through process of evidence.
18. She pointed out that the Respondent was trying to argue his case which was premature as the court ought to evaluate the entire evidence tendered in court. In this regard, she relied on the case of Hotstead 324/2023 & Others vs Taxation Commissioner (1925) where it was held that parties were not permitted to begin fresh litigation because of the new views they may entertain. She asserted that she was contesting the issue of Will that the Respondent had brought up and which the Trial Court had no mandate to entertain. She was emphatic that Preliminary Objection lacked merit and should be dismissed.
19. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) which states that:-

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
20. In the case of E.T vs Attorney General & Another [2012] eKLR, the court stated that courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy. It further held that the test was whether or not the plaintiff in the



second suit was trying to bring a new cause of action which had been resolved by a court of competent jurisdiction in another way.

21. It was clear from the Appellant's submissions what constituted a preliminary objection and its effect on proceedings once the same was established to exist at any given time. This court did not belabour to restate the same.
22. Parties could not evade the doctrine of res judicata merely by adding causes of action in subsequent proceedings. Indeed, the intention of this doctrine res judicata was to lock out parties who had had their day in courts of competent jurisdiction from re-litigating the same issues against the same opponents in the court system. Without it, there would be no end to litigation and the judicial process would be rendered a nuisance and brought to disrepute. The foundation of res judicata thus rested in the public interest for swift, sure and certain justice.
23. Having said so, this court checked the Kenya Law Report website but could not trace the Judgment of the Learned Judge, Musyoka J. in Kakamega HCCA No 20 of 2020. However, a perusal of the record herein showed that the Appellant had included the order/decreed issued on 27th April 2021 emanating from the said Judgment of an appeal between HG Embuya (the former Respondent (deceased)) as the Appellant and the Appellant herein who was the Respondent therein. It read as follows:-
 - a. That the appeal herein is allowed, to the limited extent of setting aside the orders of the Trial Court that directed the Respondent to go back to residing at Plot 1X Jebrok, allocating her a portion of the said Plot and directing its transfer to her.
 - b. That the Appellant shall provide the Respondent forthwith with a residence, commensurate with her status as spouse, whether by buying or renting one for her.
 - c. That other orders in the impugned Judgment shall remain intact.
 - d. That each party shall bear their own costs
24. The said orders were in respect of the decision of Hon D. S. Ratori, in Vihiga Matrimonial No 2 of 2019 between the Appellant herein as the Plaintiff and the deceased, HG Embunya as the Defendant. In the said case, the Hon Kadhi had rendered himself as follows:-
 41. Orders;
 1. Marriage between S and H still valid.
 2. H to allow S back to her matrimonial home/house at Jebrok Plot 1X with immediate effect.
 3. H to allocate and transfer a half share of Jebrok Plot 1X to S within the next twenty (21) days to safeguard her interests.
 4. Land transfer charges (in 3 above) be borne by H.
 5. H to pay S her unpaid dowry of marriage of Kshs 1000/= by Mpesa within the next thirty (30) days.
 6. Maintenance of S responsibility of H
 7. Parties and their relatives/agents to observe peace.
 8. Parties bear own costs.



25. Notably, the decision of Musyoka J only set aside the Trial Kadhi's Court order Nos (2), (3) and (4) and left the rest of the orders undisturbed. The file was forwarded back to the Kadhi's Court for execution as was ordered by Musyoka J whereupon the Trial Kadhi's Court delivered the Ruling of 21st September 2022, which was now the subject of this Appeal.
26. This court perused the Memorandum of Appeal herein and noted that Grounds of Appeal raised did not touch on the issue of the Jebrock Plot, which was an issue in the Kakamega HCCA No 20 of 2020. They were totally new issues that had been raised with regard to a Will and the issue of the Hon Kadhi admitting new documents which were within the possession of both the former and the current Respondent. In the premises, it was this court's view that this matter was therefore not *res judicata*.
27. This court noted that there could be more than one Judgment on appeal depending on rulings and/or orders made on interlocutory applications before a matter was concluded and that although one could argue that the appellate court was *functus officio*, issues arising after the conclusion of the case could also arise from rulings that could be subject of appeal if any party was aggrieved by the same.
28. The Respondent also claimed that there was delaying in forwarding this appeal for directions. Notably, courts must exercise great caution not to deny litigants their right to fair trial. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the *Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.
29. Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
30. Against this backdrop, a perusal of the Memorandum of Appeal dated 13th October 2022 and filed on 17th October 2022, showed that the Appellant had disclosed an arguable appeal as she raised triable issues on the admission of new documents after a final Judgment had been delivered in a matter. Indeed, the issues of admission of new documents and the Will by the Trial Kadhi's Court, if at all, were best canvassed in the substantive appeal.
31. In determining whether or not to allow such an application, the court was required to consider if the opposing side would suffer any prejudice if the orders that had been sought were granted. This court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Appellant herein pursued her constitutional right to be heard. If there was any prejudice, he did not demonstrate the same.
32. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Appellant be given an opportunity to have her case heard on merit as she would suffer prejudice if she was denied an opportunity to appeal against the contested Ruling.



Disposition

33. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Preliminary Objection dated and filed on 28th May 2024 was not merited and the same be and is hereby dismissed.
34. As this was a family matter, this court deviated from the general rule that costs follow events so as to preserve the family ties and hereby directs that each party will bear its own costs of the said Preliminary Objection.
35. It is hereby directed that the matter will be mentioned on 11th November 2025 for further orders and/or directions in respect of the substantive Appeal.
36. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 14TH DAY OF JULY 2025

J. KAMAU

JUDGE

