



**Masoud & another v Masoud & 2 others (Civil Appeal
E091 of 2022) [2024] KEHC 8768 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E091 OF 2022
M THANDE, J
JULY 19, 2024**

BETWEEN

KASSIM ABUBAKAR MASOUD 1ST APPELLANT

RAHMA ABUBAKAR MASOUD 2ND APPELLANT

AND

MUNIR ABUBAKAR MASOUD 1ST RESPONDENT

ALI MOHAMED ALI 2ND RESPONDENT

SULEKHA ABUBAKAR MASOUD 3RD RESPONDENT

RULING

1. The Appellants herein are aggrieved by the ruling of the Hon. Kadhi delivered on 29.9.22 and have filed the appeal herein.
2. The 1st Respondent filed a Preliminary Objection (the PO) dated 21.11.23 in opposition to the Appeal. The Objection is reproduced below:

1. That the Appeal contravenes section 80 (a) of the *Civil Procedure Act*, 1924 read together with Order 45 Rule 1 (a) of the Civil Procedure Rules, 2010, in that it attempts to make an appeal after a full review of the Judgment and retrial “de novo” of the case from:

Grounded On:

- a. That the prayers of the Objectors in the Notice of Motion dated 17th February, 2021 for a Review, which was successful, and the review done fully and comprehensively to conclusion, had the implication or end goal of nullification of the subdivision of Plot 599 Malindi to carve out a portion of



land measuring 57” x 60” for the 2nd and 3rd Respondents through setting aside and review of the Judgment issued on 9th September, 2019.

- b. That equally, the prayers in the Appellants/Objectors’ Memorandum of Appeal dated 25th October, 2022 at page 1 of the Record of Appeal, have the same implication or end goal of nullification of the subdivision of Plot 599 Malindi to curve out a portion of land measuring 57”x 60” for the 2nd and 3rd Respondents through the setting aside of the Ruling in Misc. Appl. No. 24 of 2019 dated 27th September, 2022.
 - c. That the Appellants/Objectors advocates have tactfully changed language and basis of argument from forged signature of the contract in the review suit to subdivision done in contempt of orders of the court in the appeal, both arguments being declined by the Kadhi. Reasons Wherefore the 1st Respondent/Petitioner pray:
 1. That this Honourable Court is urged to be vigilant and refuse to allow litigants to abuse the court processes by sneaking in appeals after review where the conditions were that if parties chose to go for a review they have opted not to appeal because this amounts to appeal twice of half a second bite at the cherry and litigation must come to an end whose activities have the severe effect on the court of clogging them with backlogs.
 2. That this Honourable Court therefore do find that Appeal is an abuse of the court process as it is an attempt to appeal after a review to its full determination.
 3. That the Honourable Court be pleased to strike out the Appeal with costs and release the Kadhi Court Cause No.30 of 2014 back to the Kadhi’s Court which was ready for issuance of Judgment.
3. Section 80 of the [Civil Procedure Act](#) provides for review and stipulates as follows:
- Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
- Order 45 Rule 1(a) of the Civil Procedure Rules further provides:
1. Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed,



and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

4. I have looked at the submissions by the 1st Respondent. I agree with the Appellants that they dwell at length on facts and the history of the matter that was before the court below. The 2nd and 3rd Respondents supported the PO. Their submissions are however not on the PO but on the Appeal.
5. The Appellants submitted that what is before the court is not a preliminary objection as it has not raised a pure point of law. They argued that the issues raised on how the Hon. Kadhi agreed to review the judgment and allowed the case to be heard de novo is an issue of fact. Further that the grounds of objection in the PO are misplaced for being factual and history rather than points of law. They contended that the Appeal is properly before court and that the PO is a scheme to delay the hearing of the Appeal.
6. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold rendered himself thus:

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.

And Law, JA stated:

So far as I'm aware, 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.

7. Although the objection in the PO is that the Appeal offends the provisions of Section 80(a) of the [Civil Procedure Act](#) and Order 45 of the Rules thereunder, the submissions do not address the manner in which the said provisions are contravened.
8. The listed grounds of the PO are that the prayers in the memorandum of appeal have the same implication or end goal of nullification of the subdivision of Plot 599 Malindi to carve out a portion of land measuring 57" x 60" for the 2nd and 3rd Respondents. Further that the Appellants' advocates have tactfully changed language and basis of argument from forged signature of the contract in the review suit to subdivision done in contempt of orders of the court in the appeal, both arguments being declined by the Kadhi. These are questions of fact that need to be ascertained.
9. Additionally, as indicated herein, the submissions dwell at length on facts and the history of the matter that was before the court below. They raise contentious issues such as whether the setting aside of the orders of 9.9.19 by a court of concurrent jurisdiction was lawful, whether the issues in dispute were thoroughly canvassed and determined by a competent court, whether the issues in dispute were properly examined in the review of judgment and whether the Appellants have a recourse of appeal



after failure of review. These, with respect, are issues that ought to have been raised in opposition to the application for review in the lower court, or in an appeal.

10. A preliminary objection cannot be raised where facts are to be ascertained. What the 1st Respondent alludes to are contentious issues of fact that need to be ascertained and cannot form the basis of a preliminary objection. In this regard I am guided by the holding in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR where the Supreme Court stated as follows:

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.

11. The improper filing of preliminary objections has been frowned upon by our superior courts as they do nothing but occasion delay, needlessly increase costs and even waste judicial time. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold opined:

The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.

12. This is evidently a clear case of an improper raising of a preliminary objection and has served to unnecessarily delay the matter herein and increase costs. In the result, I find that the Preliminary Objection dated 21.11.23 lacks merit and the same is hereby dismissed with costs to the Appellants.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF JULY 2024

M. THANDE

JUDGE

