Josephine v Attorney General (Criminal Appeal 128 of 2009)
[2015] KECA 407 (KLR) (25 September 2015) (Judgment)

Mukazitoni Josephine v Attorney General Republic Of Kenya [p2015] eKLR

Neutral citation: [2015] KECA 407 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 128 OF 2009

MK KOOME, JW MWERA, F SICHALE, JO ODEK & S OLE KANTAI, JJA

SEPTEMBER 25, 2015

BETWEEN

MUKAZITONI JOSEPHINE ..... APPELLANT

AND

ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... RESPONDENT

(An appeal from Ruling of the High Court at Nairobi (M. Apondi J.) dated 30th June 2009 in H.C. Misc. App. No. 244 of 2008)

JUDGMENT

1. The United Nations Security Council Resolutions Nos. 955 of 1994; 978 of 1995; 1165 of 1998; 1503 of 2003 and 1534 of 2004 called upon United Nations member states (Kenya amongst others by name) to cooperate with the United Nations International Criminal Tribunal for Rwanda (hereinafter "ICTR") by tracing and freezing the assets of one Mr. Felicien Kabuga who is allegedly a fugitive on the run. A warrant for his arrest was issued on 26th November 1997 by ICTR. The Prosecutor of ICTR indicted Mr. Kabuga with conspiracy to commit genocide to wit that he did conspire with others to kill or cause serious bodily or mental harm to members of the Tutsi population in Rwanda with intent to destroy in whole or part 1 the said Tutsi ethnic group. The said Mr. Felicien Kabuga has never been arrested and brought before the ICTR to answer the charges.

2. The appellant, Mukazitoni Josephine, is the wife to Mr. Felicien Kabuga. They are Jointly registered as co-owners of all that property situated in the City of Nairobi in the Republic of Kenya known as House No. 6 on LR No. 1/1154 (Spanish Villas) - (hereinafter referred to as "the subject property").

3. At the outset, we hereby state that the points of law in this appeal have been urged and canvassed pursuant to the repealed Constitution of Kenya which was in force at the time the case between the parties commenced in 2008.

4. In response to the aforementioned resolutions by the UN Security Council, the Attorney General of the Republic of Kenya (respondent) - moved the High Court by way of an Originating Notice of Motion dated 5th May 2008, seeking Orders for preservation of House No. 6 on LR No. 1/1154 (Spanish Villas). The motion prayed for further orders to restrain the appellant and Mr. Felicien Kabuga from alienating, selling, disposing off, wasting or damaging the subject property or any part thereof or any interests or rights therein until the conclusion or other determination of the case pending before ICTR being Case No. ICTR-97-22-1 against Mr. Felicien Kabuga or until further orders of the High Court. A further prayer was that all rental income or 2 proceeds collected or received from the subject property be deposited with the Registrar of the High Court until the conclusion of the ICTR case or further orders of the High Court.

5. The respondent's Origination Motion was heard ex parte at the first instance and the High Court on 6th May 2008 issued ex-parte orders for the preservation of the subject property and directed that the rental income be deposited with the Registrar of the High Court. The ex-parte orders made on 6th May 2008 are still in force as at the date of this judgment. To date, the respondent's Originating Notice of Motion is yet to be heard inter parties because a preliminary objection challenging the jurisdiction of the court and competence of the motion was raised and a ruling delivered which is the subject of this appeal.

6. The respondent's Originating Notice of Motion is stated to have been filed under the provisions of Section 60 of the Constitution, the Geneva Convention Act, Cap 198 of the Laws of Kenya; Kenya's Obligations under International Law and the Resolutions of the United Nations Security Council as well as the Inherent Powers of the Court and all Enabling Provisions of Law, Procedure and Practice. (Emphasis ours).

7. Upon service of the Originating Motion by way of newspaper advertisement, the appellant entered appearance and filed a Notice of Motion dated 28th July 2008. The preliminary objection cited the following grounds:

   "a. That the suit/application was incompetent, bad in law and a non-starter as it was founded on a non-existent criminal proceedings;

   b. The filing of the suit as a Miscellaneous Criminal Application by Originating Motion was fundamentally defective in procedure consequently rendering it a nullity and or void ab initio;

   c. That the High Court had no jurisdiction to entertain the application or to grant the orders sought;

   d. That the High Court was not an agent of ICTR or a Chamber of the ICTR;

   e. That the grant of the orders sought was not within the competence of the ICTR Chamber and the High Court could not make orders not within the jurisdiction of or ultra vires a Chamber of ICTR;

   f. That no justifiable claim or cause of action was disclosed or set out as against the appellant;

   g. That the Geneva Convention Act is not applicable and cannot form the basis of the Originating Motion;

   h. That Resolution of the Security Council does not have the force of law in Kenya and cannot form the basis of or legally support the application."

8. The High Court (Apondi, J.) upon hearing the parties on the preliminary objection delivered a ruling dated 30th June 2009 dismissing the objection.

9. In dismissing the preliminary objection; the learned judge expressed himself as follows:

> "The issues raised in the preliminary objection can broadly be reduced to three. These are:
>
> (a) lack of jurisdiction
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> (b) no cause of action against the 2nd respondent (appellant herein)
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> (c) incompetence of the application.
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> Despite the fact that the counsel for the 2nd respondent has submitted extensively on the issue of jurisdiction, there is no doubt that the property LR No. 1/1154 – House No. 6 is situated in Nairobi which is the capital city of Kenya. .... There is also no dispute that the rental income has been in the past deposited in a back account No. 14872 in Commercial Bank of Africa which has a sizeable presence in our capital city. Section 60 (1) of the Constitution of Kenya states that there shall be a High Court, which shall be a superior court of record and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law... I have no doubt whatsoever that this court has the jurisdiction to deal with the issues relating to LR No. 1/1154 – House No. 6 also known as Spanish villas.
>
> Section 75 of our Constitution leaves no doubt about our commitment and obsession to protect private property in a lassiez faire economy. Under the section, no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except ....
>
> The State, through the Attorney General has not purported to acquire the property compulsorily but has requested for the same to be preserved and for the rental income to be deposited with the Registrar of the High Court pending the determination or conclusion of Case No. ICTR – 97-22-1 at the ICTR.
>
> ...As far as the issue of cause of action against the 2nd respondent is concerned, it is crystal clear that the above named property is in the names of Kabuga Felicien and Mukazitoni Josephine. That means that the named property belongs to the 1st and 2nd respondents who are legally married. They are man and wife. No doubt, I concur with the DPP that the title to the property is joint indivisible, inseparable and unseverable from that of the 1st respondent. I also agree that her title and interest are interwoven with that of her dear husband. The only conclusion that the court can make is that the cause of action is against the entire property.
>
> As far as the competency of the application is concerned, I hereby find the same is properly before the High Court. Having carefully considered the format that has been quoted in the case of Masaba – v-Republic (1967) EA 488, I hereby find that the same conforms to what has been laid down by the trial judge.

> As regards ground Nos. 4, 5, 7 and 8 of the Preliminary Objection, Kenya is a voluntary member of the United Nations that has a multiplicity of organs that deals with various concerns. This Court has considered the following resolutions of the Security Council Nos. 955 of 1994, 1165 of 1998 and No. 1431 of 2002. All the above resolutions require member states to co-operate fully with the ICTR that is currently based in Arusha.... I hereby dismiss the preliminary objection and order that the two pending applications be consolidated and heard on a date convenient to all the learned counsels. The Orders made on 6th May 2008 are still in force till further notice."

10. Aggrieved by the dismissal of the Preliminary Objection, the appellant instituted the instant appeal. The parties filed a Statement of Agreed Issues to be canvassed in this appeal by a letter dated 19th April 2010, as follows:

    "a) The nature, character and legal effect (if any) of the Resolutions of the United Nations Security Council made under Chapter 7 of the United Nations Charter.

    b) Whether such Resolutions have a binding force under customary international law.

    c) Whether the United Nations Security Council Resolutions (under Chapter 7 of the UN Charter) requiring Kenya to co-operate with the International Criminal Tribunal for Rwanda (ICTR) in the tracing and freezing of assets and property of Mr. Felicien Kabuga in Kenya impose upon Kenyan Authorities an obligation to co-operate and if so, whether such obligation is enforceable by Kenyan Courts under the Kenya domestic law.

    d) Whether the learned Judge of the High Court had jurisdiction to entertain the application by the respondent herein dated 5th May 2008 and to grant the orders sought therein.

    e) Whether the orders sought by the respondent herein contravene the provisions of Section 75 (1) of the Constitution of Kenya.

    f) Whether the application dated 5th May 2008 was competent in form and procedure."

11. At the hearing of this appeal, learned counsel Mr. Gershom Otachi, Ms Betty Nyambati and Ms Rosebella Nyonye appeared for the appellant while the respondent, the Attorney-General, was represented by the Senior Assistant Director of Public Prosecutions (SADPP), Mr. Njagi Nderitu and SADPP Ms Mary Oundo.

12. On the issue of jurisdiction, counsel for the appellant submitted that the learned judge erred and curved for the court a jurisdiction that did not exist in law; that the High Court lacked jurisdiction because it was acting for and on behalf another court - the ICTR; that the indicted Mr. Felicien Kabuga has never been arrested and thus the substratum of the ICTR case has never existed; that a court cannot exercise jurisdiction when the substratum does not exist; that there is no pending criminal proceedings in Kenya that could confer the High Court with jurisdiction; that the learned judge erred in granting orders in relation to criminal proceedings existing in a foreign jurisdiction; that by the United Nations Security Council Resolution 1966 of 2010 dated 22nd December 2010, the ICTR has ceased to exist and it will never handle any case against Mr. Felicien Kabuga; that the ICTR having ceased to exist, the condition attached to the ex-parte orders made by the High Court on 6th May 2008 stipulating that the said orders remain in force until Mr. Felicien Kabuga is presented to the ICTR, can no longer be fulfilled and that this Court should discharge the ex-parte orders as both the substratum and ICTR do not exist.

13. Counsel for the appellant cited the decision of this Court in Thomas Patrick Gilbert Chomondeley -v- R Criminal Appeal No. 116 of 2007 in support of the submission that the High Court cannot curve and create more jurisdiction for itself under the provisions of Section 60 (1) of the Constitution and that there is nothing in law like inherent jurisdiction of the High Court that is conferred by Section 60 of the Constitution.

14. On applicability and enforceability of the UN Security Council Resolutions in Kenya, the appellant submitted that the learned judge erred in holding that UN Security Council Resolutions are binding and applicable in Kenya. It was submitted that UN Security Council Resolutions are not treaties and have no force of law in Kenya; that Kenya has never domesticated UN General Assembly and Security Council Resolutions and as such, the Resolutions are not part of Kenyan law and are neither binding, applicable nor enforceable in Kenya; that UN Security Resolutions calling for cooperation by Member States may bind the Member States but without domestication they have no force of law in Kenya; that the UN Resolutions calling forfreezing of assets of Mr. Felicien Kabuga in Kenya violate Section 75 of the then Kenya Constitution that protected the right to private property; that the UN Security Council Resolutions are couched in general terms and they violate the Kenya Constitution and that the UN Security Council Resolution Nos. 955 of 1994, 978 of 1995, 1165 of 1998, 1503 of 2003 and 1534 of 2004 that are in issue, are subject to the Kenya Constitution that protects the right to private property.

15. Counsel further contended that the learned judge erred in making and extending the ex-parte orders of 6th May 2008 in violation of Section 75 of the Constitution. The argument in support thereof is that the appellant as the registered co-owner of the subject property is not the subject of any criminal proceedings before the ICTR or in Kenya; that there is neither a criminal allegation nor a warrant of arrest against the appellant before the ICTR or in Kenya; that the UN Security Council Resolutions were not issued against the appellant; that the learned judge had no jurisdiction to make an ex-parte order freezing the property of the appellant when there is no warrant of arrest, cause of action or any pending criminal case against the appellant in Kenya or before the ICTR; that the order freezing the appellant's property is taking of property in violation of Section 75 of the Constitution; that although the property is registered in the joint names of the appellant and Mr. Felicien Kabuga, the appellant's right to protection of private property is violated by the ex-parte orders made on 6th May 2008 and extended on 30th June 2009.

16. The respondent in opposing the appeal urged that the High Court has jurisdiction to hear the Originating Notice of Motion dated 5th May 2008; that the motion is originating because it is the original suit in Kenya and there is no similar cause of action or suit on the subject property; it was submitted that Section 75 of the Constitution is inapplicable because the orders sought and granted ex-parte by the High Court do not constitute compulsory acquisition or a taking of property; that what the respondent is seeking and what the court ordered is preservation of the subject property; that the appellant's proprietary title to the subject property is neither in dispute nor in issue and that the appellant's proprietary right and interest in the subject property remains intact and is unaffected by the respondent's application or the ex-parte orders granted by the court.

17. On applicability and enforceability of United Nations Security Council Resolutions in Kenya, the respondent urged this Court to find that such resolutions are binding, applicable and enforceable in Kenya; that what the High Court did in granting the ex-parte orders was to respect Kenya's obligations under international law; that it is not contested that Kenya is a member of the United Nations and subject to the UN Charter; that the UN Charter is a statute of general application under Section 3 (1) (c) of the Judicature Act; that the UN Charter is applicable in Kenya pursuant to the provisions of Article 2 (5) and (6) of the 2010 Constitution; that the General Assembly and Security

Council Resolutions are part of customary international law and have the force of law in Kenya; that the Security Council Resolutions are norms of international law; that there is nothing immoral or repugnant about the UN Resolutions that are in issue in this appeal and that the ICTR having been established by a Resolution of the UN Security Council, its decisions are binding, applicable and enforceable in Kenya.

18. Counsel for the respondent referred to Articles 25, 39, 40, 48 and 49 of the UN Charter and submitted that these Articles impose a binding obligation on UN member states to abide by the Resolutions of the Security Council. It was submitted that Resolutions Nos. 955 of 1994; 978 of 1995; 1165 of 1998; 1503 of 2003 and 1534 of 2004 of the Security Council were made under Chapter 7 of the UN Charter which imposes a legal duty under international law on Kenyan to co-operate with the ICTR and that the terminology and obligation of the UN member states to cooperate apply not only to the executive arm of government but extends to the judicial and legislative arms of government of respective member states. It was submitted that UN Security Council Resolutions are part of international customary law and once customary international law is established, it automatically becomes part of municipal law and does not require domestication; that customary international law is part of the common law.

19. The respondent urged this Court to note at the heart of the appellant's case is the contention that she is a co-owner of the subject property. It was emphasized that there is no dispute that the appellant is a co-owner; that the title to the property does not show that the co-owners are tenants in common and that in the absence of tenancy in common, the appellant is the proprietor of an inseparable, indivisible and unseverable interest in the subject property. As regards the rental income arising from the subject property, it was submitted that the appellant's right to the rental income had not been taken away, what the respondent is seeking is an order to preserve the rental income so that the same should not be used to facilitate the upkeep and maintenance of the fugitive on the run.

20. In concluding his submission, counsel for the respondent submitted that the instant appeal was incompetent and not properly before Court; that leave to appeal was granted by the High Court on 28th July 2009 and the appellant was required to file the appeal within ten (10) days of leave; that the Memorandum of Appeal was filed on 13th October 2009 which was way beyond the ten days and that the High Court order granting leave was not adhered to and therefore this appeal is incompetent and should be dismissed.

21. We have considered the agreed issues for determination in this appeal, the able submissions by counsel and the bundles of authorities presented. We thematically categorize the following as key issues for determination in the appeal:

    "a. whether the High Court had jurisdiction to hear and entertain the Originating Notice of Motion dated 5th May 2008;

    b. whether the orders sought in the Originating Motion dated 5th May 2008 violate the appellant's right to private property under Section 75 of the Constitution;

    c. whether a cause of action is disclosed against the appellant;

    d. whether UN Security Council Resolutions are part of customary international law;

    e. whether UN Security Council Resolutions Nos. 955 of 1994; 978 of 1995; 1165 of 1998; 1503 of 2003 and 1534 of 2004 are applicable and enforceable in Kenya;

    f. whether the instant appeal is competent before this Court."

Jurisdiction of the High Court in relation to the Originating Notice of Motion dated 5th May 2008

22. The Supreme Court in Samuel Kamau Macharia and Another v. Kenya Commercial Bank and 2 Others, S.C. Civil Application No. 2 of 2011 was categorical in its pronouncement on the jurisdictional frontiers within which Courts of law must operate (paragraph 68 of the Ruling):

> "A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

23. The knot connecting the appellant and respondent as per the Originating Notice of Motion dated 5th May 2008 is House No. 6 on LR No. 1/1154 (Spanish Villas), whose proceeds according to the respondent were being used to finance a fugitive who is on the run from the international justice system under which Kenya is obliged to offer cooperation under the international law. On the other hand the appellant contends that her property right over the suit premises was impinged upon. The decisive issue is whether the High Court has jurisdictional competence over House No. 6 on LR No. 1/1154 situated in Nairobi in the Republic of Kenya.

24. The jurisdiction of the High Court covers the entire geographical territory of the Republic of Kenya; its jurisdiction is over all persons resident and things situated, or found within the geographical boundaries of Kenya. Section 60 of the Constitution states that the jurisdiction of the High Court is original and unlimited; the original and unlimited jurisdiction is exercisable over all actors, persons and things corporeal or incorporeal found in Kenya. House No. 6 on LR No. 1/1154 (Spanish Villas) is situated and found within the geographical boundaries of Kenya; it follows that the High Court has jurisdiction over and in respect thereof. We disagree with the appellant's contention that the High Court does not have jurisdiction over House No. 6 on LR No. 1/1154. To underscore the fallacy in the appellant's contention, we pose the question - if the High Court of Kenya does not have jurisdiction over a property located in Kenya, which court would have jurisdiction? No court outside Kenya,including the ICTR, can have jurisdictional competence on property situated inKenya.

25. The appellant contended that since the subject property is jointly owned with Mr. Felicien Kabuga, who has never entered appearance in this matter, then the High Court has no jurisdiction. In our view the jurisdiction of the High Court over property situated in Kenya is neither dependent on the type nor mode of ownership of the property i.e., jurisdiction is not dependent on whether the title to property is joint or common, in trust, leasehold or freehold ; or is held as a present or future interest; jurisdiction is not dependent on whether the registered owner is physically present in Kenya; the High Court's jurisdiction over real property is dependent on the fact that the property is located within the geographical boundaries of the Republic of Kenya. The joint ownership of House No. 6 on LR No. 1/1154 is immaterial in determining the jurisdiction of the High Court. As was stated by this Court in Rafiki Enterprises Limited – v- Kingsway Tyres & Automart Limited, Civil Application No. NAI 375 of 1996, in both civil and criminal matters, there is nothing in law which would prevent the High Court from having jurisdiction since its jurisdiction is both original and unlimited.

Violation of the appellant's Right to Private Property under Section 75 of the Constitution

26. The appellant contends that the orders sought by the respondent in its Originating Motion dated 5th May 2008 violate her constitutional right to protection of private property under Section 75 of the retired Constitution. It is also contended that the ex parte orders made by the learned judge on 6th may 2008 and extended on 30th June 2009, violate her private property rights and the court has no jurisdiction to make orders violating the constitution.

27. The argument is that while the appellant is the joint owner of the subject property, she is neither the subject of any ICTR case nor of any UN Security Council Resolution nor any pending criminal case in Kenya yet an ex-parte order has been made freezing her property, taking its rental income and depositing the same with the Registrar. It is contended that the freezing order and the order that rent be deposited with the Registrar is a taking of private property in violation of Section 75 of the Constitution.

28. The respondent in converse urged this Court to find that its Originating Motion does not seek to take away any proprietary right or interest of the appellant over the subject property; that the title of the appellant is neither in issue nor under challenge; and that the Originating Motion simply seeks to preserve the subject property and rental income arising therefrom to prevent the property and its income from being utilized to facilitate the upkeep of Mr. Kabuga who is a fugitive on the run. Once the appellant can establish that the proceeds therefrom are not utilized for sustaining a fugitive onthe run, the order can be lifted.

29. We have considered the rival submissions on this issue. We observe that there is a mix-up of the question of jurisdiction and the issue of violation of constitutional protection of private property rights. Jurisdiction must first exist before violation can be determined. Whereas jurisdiction is a question of law, whether or not violation of private property rights has taken place is a question of fact to be determined and thereafter relevant laws applied. In the instant case, the facts that can prove if violation has taken place have not been determined as this appeal arose only from an interlocutory ruling on a preliminary objection. The appellant contends that their clients rights to enjoyment of private property was interfered with. While the respondent on the other hand claims that the orders freezing the rent which is alleged to go towards supporting a fugitive on the run does not amount to taking way of private property. In our view these are contested facts which could not have been adequately resolved by way of a preliminary objection. (See Mukisa Biscuit Company -v- Westend Distributors Limited [1960] EA 696, 701).

30. The respondent's application for preservation order is premised on the allegation (in paragraphs 14 and 17 of the affidavit in support thereof) that the rental income generated from the subject property is being transferred to Belgium and that Mr. Felicien Kabuga is using income generated in Kenya to avoid capture and to substantially interfere with prosecution witnesses. It has not been established through hearing or trial if there is sufficient evidence to prove the respondent's allegations that the rental income from subject property is being used to avoid capture of Mr. Kabuga. The respondent submitted that this allegation of fact has never been challenged by the appellant. The record shows that the High Court has not had an opportunity to consider and determine the factual allegations contained in the Originating Motion and the reply thereto. The contestable facts have not been adjudicated upon by the trial court. This Court as an appellate court is not a court that establishes facts in the first instance; facts must be established before a trial court. A dicta in the Supreme Court case of Peter Oduor Ngoge v Hon. Francis Ole Kaparo Petition No. 2 of 2012, postulates that the guiding principle is that the chain of courts in the constitutional set-up ... have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law...

31. Guided by the above dicta, we are of the view that the facts relevant for the determination of whether or not a violation of the appellant's private property rights has taken place have not been established by a trial court. The proper forum to consider and evaluate the contestable facts and arguments on the alleged constitutional violation is the High Court. Whether the respondent has tendered sufficient evidence to entitle it to the orders sought in the Originating Motion is a question of fact. As it was stated by this Court in Njeri -V- R, Criminal Appeal No. 27 of 1977, sufficiency of evidence is not a point of law but a question of fact. A preliminary objection is founded on law not fact. We find

that the High Court has jurisdiction to consider the contestable facts and make a determination on violation. In order not to prejudge and pre-empt the case, we reserve the issues of the contestable facts for determination by the High Court.

Cause of Action against the appellant and Joint Ownership of Subject Property

32. At the heart of the appellant's case is the contention that there is no cause of action against her as she is not the subject of the UN Security Council Resolutions and that there are no pending criminal charges against her in Kenya or before the ICTR yet her property has been taken away. Whereas this is true, there are two allegations in the Originating motion that in our view prima facie provide a cause of action against the appellant. The first is that the income from the subject property is being used to evade capture by Mr. Felicien Kabuga; the second is that taxes due to the Government of Kenya from income derived from assets and business owned by Mr. Felicien Kabuga are not being paid. These two allegations are in rem and attach to the subject property. The appellant being one of the registered proprietors is thereby linked to the allegations and a cause of action has been alleged against her as a joint owner.

33. The appellant contends that being a co- registered owner of the subject property, the High Court is not entitled to make any orders affecting the property because as a joint owner, her interest extends to the whole property and she is entitled to all rights and interest over the property. It is not disputed that the subject property is registered in the joint names of Mr. Felicien Kabuga and the appellant. The learned judge found that the ownership of the property is joint, indivisible, inseparable and unserverable.

34. We have considered the appellant's contention and the learned judge's finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.

35. A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as totem tenet et nihit tenet, a joint tenant holds everything and nothing (see Re Foley (deceased) Public Trustee -v- Foley & Another (1955) NZLR 702). In Stack -v- Dowden (2007) UKHL 17, the House of Lords expressed itself as follows:

> "The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence."

36. In the instant case, the title to the subject property does not indicate that the co-owners have separate interests nor are tenants-in-common or tenants in entirety. The proprietary interest of Mr. Felicien Kabuga extends to the whole property; the appellant has not demonstrated that in law, she has exclusive interest and that Mr. Felicien Kabuga, who is a registered joint owner, has no interest in the property. The burden of proof to sever and exclude Mr. Felicien Kabuga from the joint property rests with the appellant and this burden cannot be discharged by way of preliminary objection - it requires cogent evidence. In the absence of evidence, the legal presumption remains that a property registered in joint names is indivisible and not severable. For these reasons, we concur with the learned judge

that the appellant's proprietary interest over the suit property is indivisible and unseverable from the proprietary interest of Mr. Felicien Kabuga. It is apparent from the record that the appellant is not challenging the court's jurisdiction to freeze, attach or make any order against Mr. Felicien Kabuga's interest over the subject property. The law on joint tenancy is clear that a co-owner cannot exclude the other. The appellant's interest being concurrent, indivisible and unseverable from Mr. Kabuga's, the jurisdiction of the High Court extends to the entire subject property. The trial court has not determined through an inter parties hearing if there are facts that would break any of the unities of title, time, possession and interest that would allow the court to sever and divide the joint property.

Competence of the Originating Motion before the High Court and Competence of this Appeal

37. Two aspects of competence have been urged for determination in this appeal. The first is by the appellant that the Originating Notice of Motion dated 5th May 2008 is incompetent. The second is raised by the respondent that the instant appeal is incompetent as it was filed ten (10) days after leave to lodge the appeal had been granted by the High Court.

38. The learned judge, in considering the competence of the Originating Notice of Motion dated 5th May 2008, held that the said motion was competent and properly before court. In the case of Masaba -v- R [1967] EA 488, it was stated that where a constitutional point is raised in the course of criminal proceedings, the procedure for raising the same is an originating motion; that the respondent should not be the sovereign republic but the Attorney-General and the affidavit accompanying the same must be deposed by the applicant. Guided by the format recommended in the Masaba case (supra), we are satisfied the Originating Notice of Motion dated 5th May 2008, complies, in substance, with the dicta in Masaba case. We are alive to the appellant's contention that there are no criminal proceedings pending in Kenya that would justify the respondent to use the format of Originating Notice of Motion as stated in the Masaba case supra. It is our considered view that where there is no specific format stipulated by law, an applicant is entitled to move the court by way of Motion.

39. On the part of the respondent, this Court was urged to determine whether the present appeal was competent. It was urged that the appellant was granted by the High Court leave to appeal on 28th July 2008; the leave was conditional in that the appellant was to file the appeal within 10 days of leave; that the Memorandum of Appeal was filed on 13th October 2009 which was way beyond the ten (10) days; that the condition for leave was not adhered to and hence the present appeal is incompetent. For the appellant it was submitted that the instant appeal was competent and proper because the appellant was entitled as of right to appeal to this Court. That whereas the appellant sought leave, this was out of caution (ex abundati cautela) - that leave is not required to appeal to this Court.

40. On the above issue, it is necessary to point out that the respondent did not cite any provision of law to negate the submission that leave was not required for the appellant to file this appeal. Rule 59 of the Rules of this Court provide as follows:

"59.

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal." (emphasis ours).

41. Under Rule 59 (1), in criminal matters, a Notice of Appeal institutes the appeal. The respondent in its submissions relied on Rule 82 of the Rules of this Court submitting that an appeal is instituted when a memorandum of appeal is filed; Rule 82 relates to civil appeals. The instant case was lodged as

a criminal case at the High Court and the appellant filed its Notice of Appeal on 8th July 2009 which was within the time. We are satisfied that the appeal before us is proper and competent.

Applicability and enforceability of United Nations Security Council Resolutions in Kenya

42. Central to this appeal is applicability and enforceability of United Nations Security Council Resolutions in Kenya. The United Nations Security Council through Resolutions Nos. 955 of 1994, 978 of 1995, 1165 of 1998, 1503 of 2003 and 1534 of 2004 called on all UN Member States (and specifically Kenya by name) to cooperate with the ICTR. The legal question which was urged before us by counsel for the appellant is whether these UN Security Council Resolutions are binding, applicable and enforceable in Kenya.

43. In our considered opinion, the binding nature of United Nations Security Council Resolutions in Kenya is pegged to the relationship between international law and domestic law. In public international law, there are two theories that accentuate the correlation between international law and national law. These are the monist and dualist theories. In the monist theory, international law is automatically part of national law. In the dualist theory, international law is not part of national law unless it has been specifically adopted and domesticated.

44. Prior to the promulgation of the 2010 Constitution, Kenya was a dualist state. Subsequent to the promulgation of the 2010 Constitution, Kenya is now a monist state as Article 2 (5) of the Constitution stipulates that the general rules of international law shall form part of the law of Kenya. In Article 2 (6) it is stipulated that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

45. Notwithstanding the foregoing, the facts and the dispute between the parties arose prior to promulgation of the 2010 Constitution and hence in this appeal, the issue of applicability of the UN Security Council Resolutions in Kenya must be determined as per the law in existence prior to the 2010 Constitution.

46. The appellant contends that (the Government of Kenya through) the respondent lodged the Originating Notice of Motion dated 5th May 2008 at the behest of ICTR in pursuance to Resolutions by the UN Security Council. It is the appellant's case that the UN Security Council Resolutions have no force of law in Kenya as they have not been domesticated and that as at 2008 Kenya was a dualist State and there was no domestic statute that allowed application, implementation and enforcement of UN Security Council Resolutions in Kenya.

47. The respondent contends that as at 2008, the UN Security Council Resolutions were and are still binding on Kenya as a Member of the United Nations Organization. That the Security Council Resolutions in issue in this appeal were made pursuant to Chapter VII Article 25, 38, 39, 41 and 42 of the UN Charter which is a statute of general application; that Security Council Resolutions made pursuant to Articles 25, 38, 39, 41 and 42 of the UN Charter are binding and have force of law in all UN member states; that the Security Council Resolutions are part of the principles of customary international law; that principles of customary international law are self executing and do not require domestication or a local statute to implement; that the Security Council Resolutions are part of the principles common law and that principles of common law and customary international law are part and parcel of the laws of Kenya.

48. As we consider the issues at hand, it is important to distinguish between Resolutions of the UN General Assembly (GA) and Resolutions of the UN Security Council (SC).

We shall also examine comparative state practice on applicability, implementation and enforceability of Security Council Resolutions in domestic courts. Resolutions of the UN General Assembly have no binding effect in the operational realm of international peace and security. The binding scope of GA decisions covers the entire internal UN sphere (see Reparation for Injuries Suffered in the Service of the United Nations [1949] ICJ Rep 174, at 178; see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 [1971] ICJ Rep 16, at 50, Para 115).

49. In international law, Resolutions of the Security Council adopted under Chapter VII of the UN Charter are recognised as binding and Security Council decisions taken under Chapter VII of the UN Charter supersede all other treaty commitments. (See the decisions of the International Court of Justice (Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) [1992] ICJ Reports 3, paragraph 39; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide [1993] ICJ Reports 325, 439-40, paragraphs 99 et seq and also The Charter of the United Nations: A Commentary, 2nd edn., ed Simma, [2002,] pp. 1299-300).

50. Jurists have observed that there exists an almost irrebutable presumption of legality of Security Council Resolutions. (See Nigel White, "To Review or Not to Review? The Lockerbie Cases Before the World Court 12 Leiden Journal of International Law 1999 at p.403; see also the case of Armed Activities on the Territory of Democratic Republic of Congo -v- Uganda, 39 International Legal Materials 1100 ff 2000).

51. The UN Security Council Resolution the subject of this appeal directed UN member states to cooperate with the ICTR. Art. 25 UN Charter obliges all members 'to accept and carry out the decisions of the Security Council in accordance with the Charter. The International Court of Justice (ICJ) stated in the Namibia case, ICJ Reports (1971) p.16, that the interpretation of the Security Council decisions taken under Chapter VII as non-binding declarations would render Article 25 UN Charter (which obligates the UN members to accept and carry out decisions of the Security Council) "superfluous, since this [binding] effect is secured by Articles 48 and 49 of the Charter".

Comparative jurisprudence on application, implementation and enforcement of United Nations Security Council Resolutions in domestic courts

52. Comparative assessment of national jurisprudence on applicability, implementation and enforcement of UN Security Council Resolutions in domestic courts reveals divergent state practice. When the United States of America (US) adopted legislation in violation of Security Council resolutions, introducing a trade embargo against Rhodesia, it was held that the US courts had to apply US legislation (Charles Coles Diggs v George P Shultz, Secretary of Treasury United States Court of Appeal for the District of Columbia Circuit [31 October 1972] [1972] 11 ILM 1252). In this case, the applicant sought judicial enforcement of a UN Security Council Resolution which called upon member states to have no dealings with South Africa due to its then continued occupation of Namibia contrary to UN Security Resolution. The US Court held that the matter was non-justiciable in the United States because the specific UN Security Council Resolution did not confer on individual citizens rights that are judicially enforceable in American domestic courts.

53. In Australia, when the Postmaster-General interrupted telephone connections of the Rhodesian Information Centre, the High Court of Australia held that resolutions of the Security Council are not part of the law of the Commonwealth (Bradley v The Commonwealth High Court of Australia [Canberra 10 September 1973] 128 Commonwealth Law Reports 557).

54. In Europe, in the case of Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,, the European Court of Justice in a decision made on 3rd September 2008 held that fundamental rights as protected by European Community law limit the implementation of Security Council decisions; that the lack of any procedure for judicial review of UN Security Council Resolution was a violation of the fundamental rights protected by European Community law.

55. A contrasting case from Europe pertains to the Security Council Resolution after invasion of northern Cyprus by Turkey. The Security Council adopted UNSC Resolution 541 (1983) of 18 November 1983 (SCOR 38th Year 15) declaring the proclamation of the establishment of the Turkish Republic of Northern Cyprus ('TRNC') to be legally invalid and called upon all States not to recognize any Cypriot State other than the Republic of Cyprus. The European Court of Human Rights based itself on the Security Council resolutions as evidence for the invalidity of the establishment of the TRNC. (See Cyprus v Turkey [ECtHR] Reports 2001-IV.)

56. From Jamaica, a domestic legislation titled "The United Nations Security Council Resolutions Implementation Act of 2013" was enacted. The objective of the Act is to facilitate the implementation of UN Security Council Resolutions under Chapter VII of the UN Charter and which Article 25 requires Jamaica to carry out.

57. In Switzerland, on 21st December 1995, the Swiss Federal Assembly adopted the Emergency Federal Decree relating to Cooperation with International Tribunals Responsible for the Prosecution of Grave Breaches of International Humanitarian Law to give effect to UN Security Council Resolutions.

58. The comparative lesson from Jamaica and Switzerland is that domestication of Security Council Resolution was seen as paramount to applicability, implementation and enforcement of UN Security Council Resolutions.

59. In the United Kingdom, the House of Lords in Ali Al-Jedda –v- Secretary of State for Defence; HL [2007] UKHL 58, applied the principle of the primacy of UN obligations over conflicting human rights obligations. All five Lords of Appeal found that the United Kingdom's obligations under the European Convention had to be limited by obligations due under the UN Charter. Lord Bingham expressed himself as follows:

> "Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorized by UNSCR [United Nations Security Council Resolution] 1546 and successive resolutions, but must ensure that the detainee's rights under Article are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense."
>
> Baroness Hale agreed with Lord Bingham that the Convention rights could be qualified by "competing commitments under the United Nations Charter", but continued:
>
> "That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent

required or authorized by the Resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences."

Did High Court act at behest of ICTR or foreign authority?

60. In the instant case, the appellant contended that the respondent, the Attorney-General of the sovereign Republic of Kenya erred in acting at the behest of ICTR and UN Security Council which are extra-territorial and foreign bodies; and likewise, the High Court erred in acting at the behest of ICTR which is a foreign court. The appellant cited to us persuasive judicial decisions on non-justiciability of acts of foreign sovereign states. (See Regina –v- Evans & Another and Commissioner of Police (1999) UKHL 17) and Kaunda & others -v- President of Republic of South Africa (CCT 23/04 2004_ ZAACC 5, (4TH August 2004)). We are of the considered view that the persuasive authorities cited are not relevant because sovereign immunity, diplomatic protection and act of state were never issues raised and canvassed in the preliminary objection.

61. We are alive to the United Kingdom decision in JH Rayner -v- Department of Trade and Industry (1988) 3 All ER 257 wherein it was held that "except to the extent that a treaty becomes incorporated into the laws of United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual."

62. The pleadings on record clearly show that the High was moved by the respondent and not by a foreign court; neither the ICTR nor UN Security Council filed any pleadings before the court; any person (natural or legal) who is resident in Kenya is at liberty to move a Kenyan court to seek relief and determine the nature and extent of his rights and obligations. The subject property in this suit being located within the jurisdictional competence of the High Court of Kenya, it was proper for the respondent to move the court. Subject to limited exceptions such as malicious prosecution, vexatious litigation and abuse of court process, the motivation or reasons that make a person to move a court is immaterial - access to court is open to all without restrictions, the Attorney General included.

63. We cite with approval the dicta in Prosecutor -v- Augustine Gbao (Case No. SCSL- 2004-15-AR72 (E) Decision of 25th May on Preliminary Motion on invalidity of the Agreement between the United Nations and Sierra Leone where it was stated that "the judicial power exercised by the Special Court of Sierra Leone was not that of Sierra Leone but that of the Special Court itself reflecting the interests of the international community." We adopt this reasoning and opine that the jurisdiction exercised by the High Court of Kenya is not that of the ICTR or Security Council but the jurisdiction of the High Court of Kenya exercisable over all persons and things resident, located or found in the territory of the Republic of Kenya; this jurisdiction is neither premised on Resolutions of the Security Council nor decisions of the ICTR or any other foreign entity.

64. Having examined comparative jurisprudence, we now consider the applicability and enforceability of Security Council Resolutions in Kenya prior to promulgation of the 2010 Constitution.

65. The comparative jurisprudence leads us to conclude that as a principle of public international law, UN Security Council Resolutions Nos. 955 of 1994; 978 of 1995; 1165 of 1998; 1503 of 2003 and 1534 of 2004 calling on all UN member states to cooperate with the ICTR is binding on Kenya at the international plane, the Security Council Resolutions were made pursuant to Chapter VII of the UN Charter and Resolutions adopted in terms of Chapter VII are binding on member states. (See The Charter of the United Nations: A Commentary, 2nd edn. ed Simma, [2002,] pp. 1299-300).

66. The core issue is whether these binding Security Council Resolutions are applicable and enforceable in Kenya without an enabling domestic legislation. The Security Council Resolutions require states to

cooperate, it does not prescribe the precise method or means a state has to apply in cooperation; a state has broad discretion to decide the steps it will take and in what manner it will cooperate to implement the Resolutions.

67. Under Section 3 of the Judicature Act (Cap 8 Laws of Kenya), one of the sources of laws in Kenya is the substance of common law, doctrines of equity and the statutes of general application in force in England on 12th August 1897. Is international customary law part of the common law of England and hence received in Kenya as part of the substance of common law under the Judicature Act? In considering this matter, distinction should be drawn between international customary law, general principles of public international law and treaty law.

68. In Trendtex Trading Corporation Ltd. -v- Central Bank of Nigeria [1977] 1 QB 529; [1977] 1 All ER 881; it was held that customary international law was incorporated into English law so what when its rules changed, English law also changed. In this context, Lord Denning stated that "international law does change, and the courts have applied the changes without the aid of any Act of Parliament. Thus when the rules of international law were changed... the English courts were justified in applying the modern rules of international law." In the Indian case of PUCL -v-Union of India(1999) 2LCR 1it is stated that "it was almost an accepted proposition of law that the rules of customary international law which were not contrary to municipal law should be deemed to be incorporated in domestic law."

69. In England, as far early as 1737, Lord Talbot in Burot -v- Barbuit (Cas.t.Talb.281 (1735) stated that "the Law of Nations to its fullest extent, was part of the law of England. Lord Mansfield in Triquet -v- Bath (3 Burr.1478,1480 (1764) said that he had a clear recollection that the rule that international law was part of English law went back at least as far as Lord Holt. In the 1861 case The Emporer of Austria -v-Day & Kossuth (2 Giff.628, 678 (1861) it was held that international law has been upon unquestionable authority part of English law. (See D.P. O'Connell, International Law, Volume 1, 1965 at pages 58-59). In 1990, in JH Rayner – v-Department of Trade and Industry (1990) 2AC 418, the UK House of Lords stated that international treaties do not form part of English law.

70. Guided by the pre-12th August 1897 English decisions, it is debatable whether international customary law or general principles of public international law are part of the substance of common law of England to be taken as a source of law in Kenya under the reception clause in Section 3 of the Judicature Act. State practice reveals that international customary rules are to be considered part of the law of the land and enforced as such with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. (See Zoernsch -v-Waldock [1964] 1 W.L.R. 675 at 691 as per Lord Diplock). Lord Atkin in Commercial and Estates Co. Of Egypt -v- Board of Trade [1925] 1 KB 271 at 295 stated that international law can confer no rights cognisable in the municipal courts but only in so far as the rules of international law are included in the rules of municipal law that they can be allowed to give rise to rights and obligations.

Application of general principles of international law and international customary law in Kenya prior to 2010 Constitution

71. The respondent submitted that the UN Charter is a statute of general application with force of law in Kenya under the provisions of Section 3 of the Judicature Act. This is not correct as t

72. The UN Charter came into force in 1945 and is not a statute of general application under Section 3 of the Judicature Act; the cut off date for statutes of general application is 12th August 1897. In addition, the UN Charter is not a statute enacted in England.

73. Local jurisprudence exists on application in Kenya of general principles of international law and principles of customary international law in the absence of domesticating legislation. In Rono -vs- Rono & Another- Civil Appeal No. 66 of 2002 (unreported) this Court stated:-

> "Even though Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated, current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation."

74. In Kenya Airways Corporation Ltd. -v- Tobias Oganya Auma & 5 others, Civil Appeal No. 350 of 2002, this Court stated:

> "Thus, to the extent that it can be demonstrated, in a suitable case, that the domestic law is ambiguous, uncertain or totally lacking, there is no reason, in our view why courts cannot have regard to international customary law and international instruments ratified by Kenya without reservation, to resolve such ambiguity or uncertainty."

75. A persuasive dicta adopted in Rono-v-Rono supra is found in Longwe -v- International Hotels (1993) 4 LRC 221where Justice Musumali stated:

> "...ratification of such (instruments) by a nation state without reservation is a clear testimony of the willingness by the State to be bound by provisions of such (instruments). Since there is that willingness, if an issue comes before this Court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty or convention in my resolution of the dispute."

76. In Rono -vs- Rono & Another (supra) and in Dennis Mogambi Mong'are -v-Attorney General & Others Civil Appeal No. 123 of 2012, the universality of the Banglore Principles was underscored. Principle 7 of the Bangalore Principles on Domestic Application of International Human Rights Norms states:

> "It is within the proper nature of the judicial process and well established functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national Constitutions, legislations or the common law." (emphasis ours).

77. In A.O.G. -vs- S.A.J. & Another, Civil Appeal No. 188 of 2009, this Court stated that Section 3 Judicature Act, Chapter 8, Laws of Kenya spells out the mode of exercise of jurisdiction of all the courts in this country. This Court in its dicta observed that Kenyan courts may apply ratified treaties and international customary law where there is no conflict with existing law or for purposes of removing ambiguity or uncertainty in our laws.

Comparative jurisprudence on conflict between national constitution and state obligation under international law

78. In R (on application of Campaign for Nuclear Disarmament) -v- Prime Minister (2002) EWHC 2759, the UK court held that domestic courts have jurisdiction to consider international instruments. It was stated:

> "Domestic courts will not determine the meaning of an international instrument operating purely on the plane of international law. The only cases in which the court will pronounce on an issue of international law are cases where it is necessary to do so in order to determine the rights and obligations under domestic law, so as to draw the court into the field of international law. (See Kuwait Airways Corp. – v- Iraqi Airways Co. Nos. 4 and 5 {2002} UKHL 19; [2002] 2 AC 883)."

79. In the Polish National in Danzig case, (PCIJ. Ser. A. /B. No. 44, 1931 at p.24), the Permanent Court of International Justice stated that "it should be observed that according to generally accepted principles, a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law. In the George Pinson Case (decision of 18th October 1928, in United Nations Reports of International Arbitral Awards, vol. V pp. 393-94), the umpire dismissed the view that in case of conflict between the constitution of a state and international law, the former should prevail, by pointing out that this view was absolutely contrary to the very axiom of international law.

80. Article 27 of the 1969 Vienna Convention on the Law of Treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

81. Having evaluated the comparative jurisprudence from different countries we are now in position to answer the question whether UN Security Council Resolutions that are subject of this appeal are binding, applicable and enforceable in Kenya. We have established that the said Resolutions are binding on Kenya as a member of the United Nations. At the domestic level, Kenyan courts have held that resort to international customary law and international instruments ratified by Kenya is proper in order to fill a gap or uncertainty in law in the absence of implementing domestic legislation. We are also convinced that a court in Kenya ought not to restrict the right of the Sovereign Republic of Kenya to respect and observe her international obligations unless there are compelling reasons – a court of law ought not to encourage the country to violate her international obligations.

82. In the present case, the Security Council Resolutions in issue are not treaties that require domestication to be applicable and enforceable in Kenya. The binding character of Security Council Resolutions on Kenya stem from the obligatory nature of Resolutions made under Chapter VII of the UN Charter and from the general principles of international law. Kenyan courts can make reference to Security Council Resolutions where it is necessary to do so to determine rights and obligations under Kenyan law or where necessary to draw the court into the field of international law; the Kenyan courts can properly take into account the spirit and substance of the Resolutions when considering a matter with an international dimension in which the Resolutions are relevant.

83. A paper by E. Rosand: titled "The Security Council as "Global Legislator: Ultra Vires or Ultra Innovative? (2009) 28 Fordham International Law Journal 542). It is argued that the United Nations Organization or the Security Council are not corporate organs formally empowered to enact binding laws directly to international legal subjects. We agree with this opinion because under the retired constitution and even the current one, the Security Council is not recognized as a legislative organ that

can make laws for Kenya. The UN Security Council Resolutions the subject of this appeal recognize the primacy of municipal law. A constant theme in all the Resolutions is that UN member states are to cooperate "in accordance with their national law and take measures necessary under their domestic law to implement the Resolutions." We are convinced that the Security Council Resolutions are binding, applicable and can be implemented in Kenya to the extent that Kenya's Constitution and domestic law permit. The supremacy clauses in both the retired and current Kenyan constitutions reaffirm the primacy of the Constitution and no other legal instrument or source of law can override the written Constitution.

Are Security Council Resolutions parts of international customary law?

84. The respondent urged this Court to find that Security Council Resolutions are part of customary international law and thus applicable and enforceable in Kenya. Customary international law is established through state practice. In the Nicaragua Case (1986) ICJ Rep. 14, at pg. 103 Para 195, the International Court of Justice observed that Acts of Security Council are relevant evidence to the formation of customary international law and the resolutions may reflect customary international law. Jurists are of the view that whereas Security Council Resolutions help in creation of customary international law, the said Resolutions are not evidence of the content of customary international law. (See Schwebed; The Legal Effects of Resolutions of UN General Assembly on Customary Law, 73 ASIL Proceedings 1979, 301 at 303; see also Nicaragua Case (1986) ICJ Rep. 14, at pg. 101 Para 191).

85. In Kenya's legal system, existence of customary law must be proved as a fact; we find that the same is required to prove and establish customary international law. If Security Council Resolutions are part of international customary law, this must be established as a fact by way of evidence. In a preliminary objection as in this case, it would be hard to draw a distinction between Security Council Resolutions that are declaratory of the content of customary international law viz – a – viz those that simply require a certain conduct on the part of UN member states and is not declaratory or interpretive of a principle of customary international law. The respondent did not demonstrate if the Security Council Resolutions in issue in this case were declaratory of any principle of public international law or any principle of international customary law; the respondent did not show what the international custom, if any, is. There is no consensus from state practice, the emerging international jurisprudence and writing by publicists that Security Council Resolutions are part of international customary law.

86. For the foregoing reasons, whereas the United Nations Security Council Resolutions Nos. 955 of 1994; 978 of 1995; 1165 of 1998; 1503 of 2003 and 1534 of 2004 are binding on Kenya at the international plane and any violation thereof can invoke state responsibility, the Resolutions are not self executing within Kenya's domestic legal system. As the Resolutions create a binding legal obligation for Kenya they should be accorded respectful consideration within Kenya's domestic system; they should not be accorded the status of being a source of law to be applied by the Kenyan courts in the absence of implementing legislation; the said Security Council Resolutions are not a source of law in Kenya and are only applicable to the extent that Kenyan courts can make reference to them to determine rights and obligations under Kenyan law or where necessary to draw the court into the field of international law or to fill a gap or ambiguity where domestic law is ambiguous, uncertain or totally lacking. Kenyan courts when making reference to Security Council Resolutions cannot review or interpret the jurisdictional competence of the Security Council or of ICTR. Kenyan courts can only refer, consider and apply the Resolutions to the extent that they are not inconsistent with the Constitution or any other written law. Within this context, deference to a foreign court or international organ by Kenyan courts is not acting on behalf of the foreign court but simply a respectful consideration of decisions or resolutions of these extra-territorial institutions.

87. The suit between the parties commenced prior to the effective date of the 2010 Constitution. The transition clause in Section 6 of the Sixth Schedule to the 2010 Constitution provides that all rights and obligations, howsoever arising, of the Government or the Republic and subsisting immediately before the effective date shall continue to be rights and obligations of the Government or Republic after the effective date. The Security Council Resolutions the subject of this appeal were obligations of the Republic as at the effective date. Section 7 of the Sixth Schedule to the Constitution stipulates that all laws in force immediately before the effective date continue in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. Ensuing from these provisions, we note that the proceedings before the High Court were initiated in 2008 prior to the effective date. Article 2 (5) and (6) of the 2010 Constitution makes international law part of Kenya law. Consequently, we direct that the proceedings now pending before the High Court between the parties hereto be concluded taking into account Sections 6 and 7 of the Sixth Schedule and Article 2 (5) and (6) o f the 2010 Constitution.

88. Having considered the Statement of Agreed Issues filed in this appeal and analyzed the Ruling of the High Court, a pertinent question in dispute between the parties is whether the laws of Kenya allow preservation, attachment, freezing or seizure of property of a fugitive on the run against whom there is a valid and enforceable warrant of arrest. In answering this question, the nationality or citizenship of the fugitive is irrelevant. This is the central issue to be canvassed by the parties and determined by the trial court.

89. In totality, we find that the Preliminary Objection raised by the appellant before the High Court does not meet the threshold stated in Mukisa Biscuit Company -v-Westend Distributors Limited (1960) EA 696, 701. A preliminary objection should raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A preliminary objection cannot be sustained if any fact is contested and has to be ascertained. In the instant case, there are several contested facts that have not been determined; at the hearing of the preliminary objection, it was contestable and uncertain whether UN Security Council Resolutions are applicable and enforceable in Kenya. The issue of whether the proceeds of the suit property were being utilized to finance a fugitive on the run from international justice system was a contested one. We find that the appellant grounded the preliminary objection on contestable facts and contested principles of law. A preliminary objection must be grounded upon uncontroverted facts and well established and settled principles of law; if the applicable principles of law are arguable, uncertain and not settled a preliminary objection cannot succeed.

90. In the upshot we find that the learned judge did not err in dismissing the appellant's preliminary objection dated 28th July 2008. We affirm the orders made on 30th June 2009 consolidating all applications pending before the High Court and directing the same to be heard inter partes. This appeal has no merit and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2015

M. K. KOOME

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR