



**Hassan & another (As Administrators of the Estate of Mohamed Hassan Gichunge also known as Mohamed Gichunge Hassan also known as M. Kishungi H. Kitonga - Deceased) v Hassan & 2 others (Environment & Land Case E011 of 2021) [2023] KEELC 18827 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 18827 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ENVIRONMENT & LAND CASE E011 OF 2021**  
**A KANIARU, J**  
**JANUARY 31, 2023**  
**IN THE MATTER OF TITLE NO. EMBU MUNICIPALITY 1112/1571**

**BETWEEN**

**ALLY MOHAMED HASSAN ..... 1<sup>ST</sup> APPLICANT**  
**GICHUNGE ABUBAKAR GITONGA ..... 2<sup>ND</sup> APPLICANT**  
**AS ADMINISTRATORS OF THE ESTATE OF MOHAMED HASSAN**  
**GICHUNGE ALSO KNOWN AS MOHAMED GICHUNGE HASSAN ALSO**  
**KNOWN AS M. KISHUNGI H. KITONGA - DECEASED**

**AND**

**ISMAEL MSAMBA HASSAN ..... 1<sup>ST</sup> RESPONDENT**  
**LAND REGISTRAR EMBU COUNTY ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The focus of this ruling is an amended notice of preliminary objection dated June 6, 2022 and filed on June 8, 2022. It was raised by the applicants in the suit – Ally Mohamed Hassan and Gichunge Abubakar Gitonga – who were condemned to pay costs after their suit was struck out via a ruling of this court delivered on May 26, 2021. The 1<sup>st</sup> respondent in the suit – Ismael Msamba Hassan – filed a bill of costs on July 6, 2021 in which he claimed costs, Kshs 486,880. Of these costs, Kshs 480,000 was stated to be for instructions to defend the suit which, according to him, related to land worth 18,000,000/-



2. When taxation was done however, the 1<sup>st</sup> respondent got assessed costs amounting to Kshs 123,877 only. This was not very pleasing to him and he decided to contest the assessed costs via the reference first filed here on November 8, 2022 and subsequently amended and re-filed on April 12, 2022.
3. The amended reference was responded to via a replying affidavit was filed together with the preliminary objection now under consideration. The reasons for the objection were concisely spelt out thus:
  1. That the purported reference before court is incompetent for being filed out of time without leave and should be struck out with costs.
  2. That the application is incompetent for being supported by an affidavit by applicants counsel in a contentious matter/application.
  3. That the reference before court is an abuse of the court process and should be dismissed with costs in ...
4. The objection was canvassed by way of written submissions. The applicants submissions were filed on December 6, 2022. In the submissions, the applicants pointed out some shortcomings in the amended reference, which included lack of a supporting affidavit and a noticeable tweaking of grounds in the amended reference compared to the grounds that had been stated in the original reference.
5. The submissions also sought to persuade the court that the objection is based on pure points of Law. In this regard, the case of *Mary Wangari Kiarie Vs Safaricom (K) Limited* (2021), eKLR which cited with approval the case of *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributers* [1969] EA 696, was proffered for persuasion.
6. According to the applicants, the reference is incompetent for being filed out of time without leave of court. It is incompetent also for being accompanied by a supporting affidavit sworn by 1<sup>st</sup> respondents counsel who, according to applicants, should not make depositions in a contentious matter. The cases of *Kwacha Communications Limited & Another Vs Pindora Holdings Limited & Another* [2022] eKLR, *Hakika Transporters Services Ltd Vs Albert Chulah Wamimitaire* [2016] eKLR and *Magnolia Pvt Limited Vs Synermed Pharmaceuticals (K) Ltd* [2018] eKLR were cited to emphasise that advocates should not swear affidavit in contested or contentious issues.
7. The last point made is that the reference is an abuse of the court process. This point was made allegedly because the reference was filed late and the amended one came without a supporting affidavit. To drive the point home, the cases of *William Odhiambo Ramogi & Others Vs The Attorney General & Others*: Petition No 159 Of 2018 (as consolidated with Petition No 201 of 2019), Mombasa, *Ephraim Miano Thamaini Vs Nancy Wanjiru Wangai & 2 Others* [2022] eKLR, *Muchanza Investments Limited Vs Safaris Unlimited (Africa) LTD & 2 Others*: Civil Appeal No 25 of 2002 [2009] eKLR were all cited for guidance and/or for desired effect.
8. The court was ultimately urged to allow the objection.
9. The 1<sup>st</sup> respondents submissions were filed on November 30, 2022. The 1<sup>st</sup> respondent cited the cases of *Charles Onchari Ogoti Vs Safaricom Limited & Another* [2020] eKLR and *Nitin Properties Ltd Vs Singh Kalsi & Another* [1995] eKLR among others to make the point that a preliminary objection should be based on a pure point of law. He then submitted that the first point in the preliminary objection is raised for reason that it was filed out of time. He further submitted that computation of time needs to be premised on facts and evidence is required to demonstrate when the reference was filed and when time lapsed. According to the 1<sup>st</sup> respondent the reference was filed within time.



10. The 1<sup>st</sup> respondent also submitted that the issue of the value of the property is contentious. The applicants were said to have been required to offer strict proof of the value.
11. Overall, the thrust of the 1<sup>st</sup> respondents submissions is that the objection is premised on contentious facts and does not there qualify to be a preliminary objection.
12. I have considered the objection and the rival submissions filed by the parties. I have also had a look at the entire matter generally. In my view, the second and third points in the preliminary objection do not qualify as points of law. To the applicants, the affidavit supporting the reference should not have been sworn by the 1<sup>st</sup> respondents counsel as it is based on contentious matters. I have read the supporting affidavit. It appears to me that the depositions in it are matters that the 1<sup>st</sup> respondents counsel knows or can be deemed to know. He and not the 1<sup>st</sup> respondent, can be assumed to know, their correctness or truth. They mostly refer to what has transpired in this matter and the counsel is the one steering the matter in court.
13. The applicants also felt that the reference is an abuse of the court process. In my view, whether or not the reference is an abuse of the court process requires probing of evidence and prove of facts. The 1<sup>st</sup> respondent had raised a point like this in an earlier preliminary objection which led to the striking out of the suit. I had rejected that point and observed that it does not qualify to be treated as an objection. I do the same in this objection.
14. The first point raised in the preliminary objection is a pure point of law in my view. It is the law that states the period within which a reference can be filed. But as observed by the 1<sup>st</sup> respondent, the fact whether the reference was filed within time is one requiring to be ascertained. According to the 1<sup>st</sup> respondent, the reference was filed within time. Of course the applicants have a contrary view. I agree with the 1<sup>st</sup> respondent that proof is required regarding computation of time.
15. The upshot, when all is considered, is that the merits of the preliminary objection herein have not been demonstrated. The court therefore dismisses the objection with costs to the 1<sup>st</sup> respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31<sup>ST</sup> DAY OF JANUARY, 2023.**

**A.K. KANIARU**

**JUDGE**

