



REPUBLIC OF KENYA



KENYA LAW
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**Ogolla & another v New Bekhehke Women Group (Civil Appeal
E141 of 2022) [2023] KEHC 18218 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E141 OF 2022
DKN MAGARE, J
APRIL 27, 2023**

BETWEEN

JAMES WENDO OGOLLA 1ST APPELLANT

**WILFRED NYONGESA LUMBE (SUING AS OFFICIALS AND ON BEHALF OF
MEMBERS OF UVUMILIVU DEVELOPMENT CBO) 2ND APPELLANT**

AND

NEW BEKHEHKE WOMEN GROUP RESPONDENT

JUDGMENT

1. The Matter is unique, in that it dealt with a preliminary objection dated 24/8/2022 the grounds are that: -
 - a. The claim is res subjudice under section 6 of the *Civil Procedure Act*
 - b. The accident arose out of the same cause of action as 406 of 2022
 - c. The claim is an abuse of the court process.
 - d. The suit is bad in law and discloses no reasonable cause of action
 - e. Court found as a fact that the claim involves different parties from the case no RMCCC 406 of 2022.



2. In deciding the case, the court heard oral arguments on the objection. the court relied on the decision of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where the court stated as: -

“A preliminary objection consists of a pure 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 off the suit. Examples are an objection to the jurisdiction of the court.”

3. The court also relies on section 6 of the [Civil Procedure Act](#), which provides as doth: -

“6. Stay of suit No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

4. The Court relied on the case of 6. Stay of suit No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Explanation- The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

5. In [Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others](#) [2019] eKLR, the court stated as follows: -

“Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action. The filing of the petition before the trial court in the face of the consent order in ELC No 231 of 2012 was clearly an abuse of court process and sub judice. The trial court cannot therefore be blamed for so holding.”

6. The difficulty, I have is comprehending the preliminary objection is the settled standard set out in the authority *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [supra]. The Court of Appeal, Waki, Nambuye & Musinga, JJA, in [International Centre for Insect Physiology and Ecology \(ICIPE\) v Nancy McNally](#) [2018] eKLR, stated as follows in respect of the holding in *Mukisa Biscuits*

“A fortiori, if the facts pleaded are deemed to have been admitted by virtue of non response to the petition, then the PO has no legs to stand on. As such, the principles enunciated in the Mukisa Biscuit case (supra) are not met and therefore the PO was inappropriate. The Mukisa Biscuit case is, of course, the locus classicus on preliminary objection and lays down the principle that:



“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 an exercise of judicial discretion”.

7. In this case the preliminary objection and issues of res sub judice are not raised in the Plaintiff. The defense is not useful when dealing with the preliminary objection. Where did the court get the existence of another suit? This cannot be done without admission of evidence. I have perused the statement of claim and I note that CMCC 406 of 2022 is not pleaded.
8. The court also relies on facts not in the pleadings. she must have perused other documents other than the statement of claim. Evidence is not admissible in a preliminary objection.
9. Further once a matter involves different parties, it is supposed to proceed. a matter can only be res sub judice if it involves the same parties. The court erred in law in finding that the matter is sub judice.
10. I therefore find and hold that the Court was wrong in allowing the preliminary objection. Section 7 of Civil Procedure Act, requires that matter involves same particulars it ought to be stayed in this case the parties are not the same and are not claims under the same title. a matter cannot be sub judice if it cannot subsequently become res judicata.

"7. Res judicata No court shall try any suit or issue 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 the 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. Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it. Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused. Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

11. Consequently, I set aside the entire decision of the court, and remit the same back to be heard by court other than Viola Muthoni. I note referring the matter to the small claims court will meet time bar issues. I therefore refer the matter to the chief magistrate court at Mombasa for hearing and final disposal. the Appellant shall amend the statement of claim to be a plaint and proceed normally.
12. Alternatively, the Appellant can withdraw the matter and file afresh in the chief magistrate’s court. In case of such withdrawal, each party shall bear their own costs in the small claims court.



13. The Appellants will have costs of the Appeal.
14. The court notes that in matters where the court has no jurisdiction or the matter is res judicata or sub judice, the court should strike out the suit not to dismiss. dismissal leads to a bar to filing another suit.

Determination

15. I therefore make the following orders: -
 - a. I set aside the entire decision of the court, and remit the same back to be heard by court other than Viola Muthoni. I note referring the matter to the small claims court will meet time bar issues. I therefore refer the matter to the chief magistrate court at Mombasa or hearing and final disposal. The Appellant shall amend the statement of claim to be a plaint and proceed normally.
16. Alternatively, the Appellant can withdraw the matter and file afresh in the chief magistrate's court. In case of such withdrawal, each party shall bear their own costs in the small claims court.
17. The Appellant will have costs of Ksh 35,000/= for the Appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF APRIL 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

N/A for the Appellant

N/A for the Respondent.

Court Assistant - Firdaus

