



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Madison Insurance Company Limited v Khatika (Suing as the Legal
Representative of the Estate of Vincent Mutumbi) (Civil Appeal
144 of 2021) [2023] KEHC 27016 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 144 OF 2021
RE ABURILI, J
DECEMBER 21, 2023**

BETWEEN

MADISON INSURANCE COMPANY LIMITED APPELLANT

AND

**NOEL KHATIKA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE
OF VINCENT MUTUMBI) RESPONDENT**

*(An appeal arising out of the Judgement of the Honourable C.N.C
Oruo in the Senior Principal Magistrate's Court at Maseno delivered
on the 9th November 2021 in Maseno SPMCC E54 of 2020)*

JUDGMENT

Introduction

1. The appellant herein Madison Insurance Company Limited filed an application dated 23rd July 2021 seeking orders to stay the proceedings in Maseno SPMCC E54 of 2020 pending the hearing and determination of Kisumu CMCC No 174 of 2018, Alice Nyariki v Madison Insurance Company Limited on the ground amongst others that the matters in issue in both cases were substantially the same.
2. The appellant averred that unless the orders sought were granted, there was a possibility of conflicting decisions being rendered by two separate courts on the two causes that had inseparable issues of law and fact, with great prejudice occasioned on the parties none of whom would be able to execute their decrees.
3. The respondent herein opposed the application on the ground that she was not a party in Kisumu CMCC No 174 of 2018 and that none of the parties therein were litigating under her title.



4. In its ruling dismissing the appellant's application, the trial court held that for a court to uphold the rule of *sub judice*, there must be two similar parties in the two opposing suits and that in this case, the parties in both suits were different in as much as the defendants were the same.
5. Aggrieved by the said ruling, the appellant preferred the instant appeal brought by way of memorandum dated 10th December 2021 in which the appellant raised the following grounds of appeal:
 - i. The learned trial magistrate erred in law and fact by dismissing the appellant's notice of motion application dated 23rd July 2021 without appreciating that the matters in issue in Maseno SPMCC E54 of 2020 were directly and substantially in issue in Kisumu CMCC No 174 of 2018 both having arisen out of the same cause of action and seeking to compel the appellant to settle the decretal sum and costs arising from all suits filed as a result of the accident which occurred on 31st May 2015 involving motor vehicle registration number KBQ 900W, including but not limited to Maseno PMCC No 209 of 2015.
 - ii. The learned trial magistrate erred in law and in fact in dismissing the said application, whose effect was to allow both suits to proceed concurrently before two different courts with competent jurisdiction which are likely to issue two conflicting decisions over the same issues thereby making it completely impossible for the parties to execute their respective judgements, in total disregard of the *sub judice* rule and its aim, as contemplated under section 6 of the [Civil Procedure Act](#), with the result that the appellant is condemned to suffer grave injustices by having to incur the costs of defending two different suits which raise similar issues.
 - iii. The learned trial magistrate erred in law and fact by finding that the case in Maseno SPMCC E54 of 2020 was not related to Kisumu CMCC No 174 of 2018 as the plaintiffs were different in as much as the defendants were the same when the main point of congruency was the determination in both suits of the question whether the appellant was liable to settle the decretal sum arising from Maseno PMCC No 209 of 2015.
 - iv. The learned trial magistrate erred in law and fact by failing to appreciate that dismissing the appellant's application dated 23rd July 2021 not only offends the *sub judice* rule but also has the effect of unnecessarily imposing extra costs of defending the two parallel suits both of which seek determination of similar issues.
 - v. The learned trial magistrate erred in law by failing to analyse the evidence placed before court by the appellant and thereby arriving at the wrong decision.
 - vi. The learned trial magistrate erred in law and fact by failing to appreciate that the appellant had discharged the burden of proof placed on it by sections 107, 108 and 109 of the [Evidence Act](#) by placing concrete support of its application before court.
 - vii. The learned magistrate erred in law and fact by failing to appreciate the express and mandatory provisions of Section 6 of the [Civil Procedure Act](#).
 - viii. The learned trial magistrate erred in law and fact by failing to appreciate that the only available option was to allow the application dated 23rd July 2021.
6. The parties filed submissions to canvass the appeal.



The Appellant's Submissions

7. The appellants submitted that the basic purpose and underlying object of *sub judice* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, subject matter and the same relief thus pinning the parties down to one litigation so as to avoid possibility of contradictory verdicts in respect of the same relief.
8. It was submitted that a reading of the pleadings in Maseno SPMCC E54 of 2020 and Kisumu CMCC No 174 of 2018 reveals that both suits are brought against the appellant herein and seek declaratory orders against the appellant to satisfy the judgement in Maseno PMCC No 209 of 2015.
9. The appellant submits that the mere fact that the plaintiffs in both suits are not the same does not mean that the same does not offend the *sub judice* rule as both suits seek the same orders and further that the court has inherent jurisdiction to put right that which would be otherwise wrong by allowing this appeal.

The Respondent's Submissions.

10. The respondent submitted that other than the plaintiffs in the two suits in Maseno SPMCC E54 of 2020 and Kisumu CMCC No 174 of 2018 being different, the issues being canvassed by the respective parties are also different as the issue in the latter suit involved the nature of the contractual obligations by the appellant to Alice Nyariki whereas the issues in dispute in the former have to do with the appellant's statutory obligations to the respondent herein.
11. The respondent thus submitted that the trial court was thus precise to hold that the appellant's application did not have a reasonable cause of action.
12. The respondent further submitted that the appellant failed to discharge the burden of proof required to warrant grant of the orders sought before the trial court.

Analysis and Determination

13. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123.
14. As earlier stated, the appellant herein moved the trial court vide an application dated 23rd July 2021 seeking orders to stay the proceedings in Maseno SPMCC E54 of 2020 pending the hearing and determination of Kisumu CMCC No 174 of 2018, *Alice Nyariki v Madison Insurance Company Limited* on the ground amongst others that the matters in issue in both cases were substantially the same and thus offended the rule of *sub judice*.
15. Thus, the question before the trial court was whether the court should stay the proceedings therein pending the determination of Kisumu CMCC No 174 of 2018. In the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without



delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.

16. Further, in the persuasive authority in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No 43 of 2000 Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.

17. In the *Kenya Wildlife Case* (*supra*), Gikonyo J cited *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

18. Indeed, violation of the doctrine of *sub judice* is a ground that merits proceedings being halted. The doctrine of *sub judice* and its applicability in the circumstances of this appeal has its origin in Section 6 of the *Civil Procedure Act* which provides as follows on the issue of *sub judice*:

“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.”

19. The *sub judice* rule was further defined in the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR that:

“... for the doctrine of *sub judice* to apply the following principles ought to be present:-

- (a) There must exist two or more suits filed consecutively;



- (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The mere fact that the applicant in the earlier suit is a Branch of the Law Society of Kenya, while the applicant in the instant suit is the main body does not change the situation. The Branch is suing on behalf of its members. As stated earlier, should the court determine the earlier suit either way, it will render the issues in the instant suit *res judicata*. Put differently, the outcome of the earlier suit will apply to the entire membership of the Law Society.”

20. Addressing the same issue in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR) the Supreme Court of Kenya stated as follows:

“The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

21. Accordingly, then the trial court, and this court, have to consider whether the suit therein was in violation of the doctrine of *sub judice*.
22. For emphasis, for a suit to be said to violate the doctrine of *sub judice* there must:
- a. There must exist two or more suits filed consecutively;
 - b. The matter in issue in the suits or proceedings must be directly and substantially the same,
 - c. the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title,
 - d. the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
23. From the record herein, I have perused the pleadings in both Maseno SPMCC E54 of 2020 and Kisumu CMCC No 174 of 2018 and note that save for the defendant in both suits, the issues therein are totally different contrary to the allegations of the appellant herein.
24. In Maseno SPMCC E54 of 2020, the respondent herein has moved the court seeking to compel the appellant to pay a decretal sum awarded against its insured, in essence, the appellant’s statutory obligations whereas in Kisumu CMCC No 174 of 2018, the plaintiff therein, Alice Nyariki, seeks



to uphold the appellant to his contractual obligations by having it acknowledge that it is liable for compensation for accidents and injuries sustained by and to the plaintiff.

25. I reiterate that section 6 of the Civil Procedure Act is clear that the parties in the impugned proceedings must be the same. The parties in Maseno SPMCC E54 of 2020 and Kisumu CMCC No 174 of 2018 are not the same.
26. Having failed to prove *sub judice* rule, the appellant thus did not warrant grant of the orders of stay of proceedings sought in its application dated 23rd July 2021. Accordingly, I find that the trial court did not err in dismissing the appellants Notice of motion dated 23rd July 2021.
27. The upshot of the above discussion is that the instant appeal lacks merit and is hereby dismissed with costs to the respondent assessed at Kshs 20,000.
28. This file is closed. The lower court file to be returned together with this judgment for the case to proceed to hearing.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

