



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 4 OF 2019

CHARLES ONCHARI OGOTI.....APPELLANT

=VERSUS=

SAFARICOM LIMITED.....1ST RESPONDENT

THE KENYA POWER AND LIGHTING CO. LTD.....2ND RESPONDENT

[Being an appeal from the Ruling of the Senior Principal Magistrate's Court at Kabarnet PMCC. No. 33 of 2018 delivered on the 13th day of February 2019, by Hon. V.O. Amboko, RM]

JUDGMENT

[1] This an appeal from the decision of the Resident Magistrate's Court on an a Preliminary Objection filed by the 1st respondent on the ground that the suit Kabarnet SPMCCC NO 33 of 2019 is **sub judice** by virtue of a previously instituted suit in the Eldoret Employment and Labour Relations Court suit No. 157 of 2018 between the appellant and the 2nd Respondent. The Preliminary Objection was set out as follows:

"1ST DEFENDANT'S NOTICE OF PRELIMINARY OBJECTION

Take notice that the 1st Defendant shall raise a Preliminary Objection to the suit herein on grounds that:

1. The cause of action is based on a contract of employment to which the Plaintiff has admitted in his Amended Plaintiff that there are parallel proceedings in ELRC NO. 157 OF 2018, ELDORET.
2. The suit discloses of action against the 1st Defendant as the Mpesa transaction record relied on by the Plaintiff is contained in an investigation report prepared by a third party. The same were not obtained from the 1st Defendant as alleged at paragraph 8 of the Amended Plaintiff.
3. The Claim against the 1st Defendant is an abuse of this Court's process and the suit has been instituted with the ulterior motive to gain some collateral advantage from the 1st Defendant and which is an illegitimate use of the Court process.
4. The suit is bad in law, misconceived and discloses no reasonable cause of action as

against the 1st Defendant thus rendering it fatally and incurably defective.

DATED at NAIROBI this 6th day of July 2018.”

[2] By a ruling dated 13th February 2019, the trial court held as follows:

RULING

1. The 1st defendant filed a notice of Preliminary Objection on the 6th of July 2018, on the grounds that;

a) The cause of action is based on a contract of employment to which the Plaintiff has admitted in his Amended Plaintiff that there are parallel proceedings in ELRC NO. 157 of 2018 Eldoret.

b) The suit discloses no cause of action against the 1st Defendant as the Mpesa Transaction record relied on by the Plaintiff is contained in an investigation report prepared by a third party. The same were not obtained from the 1st Defendant as alleged at Paragraph 8 of the Amended Plaintiff.

c) The claim against the 1st Defendant is an abuse of this Court's process and the suit has been instituted with the ulterior motive to gain some collateral advantage from the 1st Defendant and which is an illegitimate use of the Court process.

d) The suit is bad in law, misconceived and discloses no reasonable cause of action as against the 1st Defendant, thus rendering it fatally and incurably defective.

The Notice of Preliminary Objection was supported by an Affidavit of Daniel Ndaba senior manager litigation of the 1st defendant.

2. The Preliminary Objection was argued by way of written submissions, the 1st defendant's counsel in his written submissions filed on the 11th of December 2018 argued that the present suit is subjudice by reason of the Plaintiff having sued the 2nd Defendant for the breach of contract of employment in ELRC No. 157 of 2018. The instant suit is similar and discloses no cause of action against the 1st Defendant.

3. The 2nd defendant's counsel in his submissions cited section 6 of the Civil Procedure Act and argued that the parties are substantially the same as those in ELRC No. 157 of 2018 which is before a Court of competent jurisdiction and has not been determined. Further the 2nd defendant stated that the issues in both cases are intertwined and therefore proceeding with this instant case will be a duplication and would amount to an abuse of Court process.

4. The Plaintiff's counsel in his submissions argued that there was no competent Preliminary Objection raised herein in as the objection was blurred with facts and evidence which would require the Court to interrogate and therefore cannot be sustained by way of Preliminary Objection.

5. I have read carefully considered the pleadings, evidence and submissions by the respective parties. The issues to be determined by this Court are;

a. Whether the grounds set out in the notice of Preliminary Objection are points of law?

b. Whether this case offends section 6 of the Civil Procedure Act

c. Who should pay costs if any

Whether the grounds set out in the notice of Preliminary Objection are points of law?

6. What constitutes a Preliminary Objection is set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was held that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

7. The 1st Ground in the notice of Preliminary Objection with regard to whether the proceedings in this case are parallel to proceedings in ERLC No. 157 of 2018 Eldoret raises question of sub-judice which is a point of law, since it has the potential of determining this matter with finality without the need of ascertaining any additional facts.

8. The 2nd ground raised in the notice of Preliminary Objection as to whether the suit disclose no cause of action against the 1st Defendant as, the Mpesa transaction record relied on by the Plaintiff is contained in an investigation report prepared by a third party. The issue raised about the Mpesa Transaction relied on by the Plaintiff is an issue of fact which can only be ascertained after the parties' tender evidence in trial. Therefore, the second ground does not meet the threshold set out in the Mukisa biscuit case.

9. The third and fourth grounds set out in the notice of Preliminary Objection with regard to whether the suit is an abuse of Court process and that no cause of action has been established against the 1st defendant are facts and can only be established hearing of the case and evaluating the evidence adduced and as such the ground do not establish any point of law.

10. In the Amended Complaint filed on the 11th of April 2018, Paragraph 10 states;

“that as a result of the aforementioned act and the said breach of contract the plaintiff has suffered substantial loss and damage, the particulars of loss and damage include; loss of employment and or job security. Further in paragraph 14A the plaintiff acknowledges that there is a pending suit in the Eldoret Employment and Labour Court No. 157 of 2018 in which the Plaintiff is seeking damages for unlawful dismissal by the 2nd defendant.”

11. The Amended Statement of claim filed at the Employment and labour Court on the 11th of April 2018 paragraph 10 which contains particulars of unlawfulness, unfairness, illegal and or breach of contract. 12(h) indicates breaching of the contract of employment. One of the prayers sought is damages for breach of contract against the 2nd defendant.

12. In both the Pleadings above the Plaintiff seeks damages for breach of contract arising out of an employment and employee relationship between the Plaintiff and 2nd Defendant in both courts. The claim for breach of contract is substantially in issue in both cases. Section 6 of the Civil Procedure Act states that;

“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.”

13. The 1st defendant is not a party in ELRC NO 157 of 2018. The particulars of breach of contract by the 1st defendant as contained in paragraph 8 of the Amended Plaintiff filed on the 11th of April 2018 are not in issue in ELRC NO 157 of 2018. Therefore, the suit as against the 1st Defendant does not offend section 6 of the Civil Procedure Act.

14. As noted above the Plaintiff's claim for breach of contract against the 2nd defendant in this case is a matter substantially in issue and can be addressed by ELRC NO 156 of 2018. By dint of section 6 of the Civil Procedure Act this Court cannot proceed with the trial as filed against the 2nd Defendant.

15. From the foregoing, it is hereby ordered that;

- a. The Plaintiff's suit against the 2nd Defendant is struck out.
- b. The suit against the 1st defendant to proceed for hearing.
- c. The costs of the 1st Defendant's Preliminary Objection shall be in the cause.

DATED, SIGNED and DELIVERED at KABARNET this 13th day of February 2019

HON: V.O. AMBOKO

RESIDENT MAGISTRATE ”

[3] The appellant was aggrieved by the ruling and he filed a memorandum of appeal on the grounds set out therein as follows:

“MEMORANDUM OF APPEAL

The above named Appellant being dissatisfied with the aforementioned decision now appeals to this honourable Court on the following grounds;

1. THAT the learned trial magistrate erred in law and fact in completely misapprehending the principles governing and/or what constitutes a Preliminary Objection thereby arriving at an erroneous decision with the regard to the Preliminary Objection raised by the 1st Respondent.
2. THAT the learned trial magistrate erred in law and fact in entertaining and/or delving into issues of facts while making a determination on the Preliminary Objection raised by the 1st Respondent.
3. THAT the learned trial magistrate erred in law and fact in holding that the Appellant's suit is an abuse of Court process and that the issues in controversy/dispute in Eldoret Employment and Labour Relations Court No. 157 of 2018 are substantially the same as in Kabarnet CMcc No. 33 of 2018.
4. THAT the learned trial magistrate erred in law and fact in striking out the Appellant's suit against the 2nd Respondent when the 2nd Respondent had not raised any objection to the same and never filed and/or participated in the Preliminary Objection to the same and never filed and/or participated in the Preliminary Objection filed by the 1st Respondent.

REASONS WHEREFORE the Appellant prays;

i) That the appeal herein be allowed and an order be made setting aside the subordinate's Court decision/order striking out the Appellant's suit against the 2nd Respondent and substituted the same with an order dismissing the 1st Respondent's Preliminary Objection dated 6/7/2018 with costs.

ii) That the Appellant's case against the 2nd Respondent be reinstated and matter be ordered to proceed on its merits.

iii) The Appellant prays for costs of the appeal.

Dated at Eldoret this 18th day of February 2019.”

[4] The 1st respondent filed a Notice of Cross-Appeal as follows:

“NOTICE OF CROSS APPEAL

(Under Order 42 Rule 32 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Article 159 of the Constitution of Kenya 2010 and all enabling provisions of the law):

TAKE NOTICE that on the hearing of this Appeal, **SAFARICOM LIMITED**, the above-named 1st Respondent will contend that the, above-mentioned decision ought to be varied or reversed to the extent and in the manner and on the grounds hereinafter set out, namely-

1. The learned trial magistrate erred in law by holding that the suit as against the 1st Respondent does not offend Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya.
2. The learned trial magistrate erred in law by holding that by dint of Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya, the trial as against the 2nd Respondent be discontinued; and in ordering that the suit against the 1st Respondent to proceed to hearing.
3. That the learned trial magistrate erred in law by failing to appreciate that the cause of action in this suit can, and should be canvassed in a separate suit **ELRC NO. 157 OF 2018, ELDORET, CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED**.
4. That the learned trial magistrate erred in law and in fact by failing to acknowledge the non-existence of a contractual relationship between the 1st Respondent, Safaricom Limited, and the Appellant herein with regard to the cause of action.
5. That the learned trial magistrate erred in law and in fact to appreciate that the 1st Respondent herein is alien to any pre-existing relationship, between the Appellant and the 2nd Respondent herein.
6. That the learned trial magistrate erred in law and in fact by failing to appreciate the conduct of the 1st Respondent herein at all times material to this suit was sanctioned by all applicable laws, including but not limited to statute and judicial orders.
7. That the learned trial magistrate erred in law by failing to appreciate that the cause of action in this suit as against the 1st Respondent, Safaricom Limited, is unfounded and misconceived in law.

IT IS FURTHER PROPOSED the Court for the orders that, to the extent that the trial Court found that the 2nd Respondent is improperly enjoined in this suit; and that the suit as against the 1st

Respondent should proceed to hearing, the said finding be vacated upon the following additional grounds;

1. That the cause of action herein is based on a contract for employment to which the Appellant has admitted in his Amended Plaintiff that there are parallel proceedings in **ELRC NO. 157 OF 2018, ELDORET, CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED**.
2. That the cause of action herein as pleaded by the Appellant is identical to the cause of action as pleaded in **ELRC NO. 157 OF 2018, ELDORET, CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED**, save for minor amendments to include and accommodate the 1st Respondent herein.
3. That the 1st Respondent herein is alien to the contract for employment subject matter of this suit, which is also the subject matter in **ELRC NO. 157 OF 2018, ELDORET CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED**, and for which the 1st Respondent cannot be held liable in law.
4. That the Appellant herein is alive to the underlying element of subjudice against the 1st Respondent, evinced by the decision to institute this identical suit at the Magistrate's Court in Kabarnet, away from the Employment and Labor Relations Court in Eldoret where **ELRC NO. 157 OF 2018, ELDORET, CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED** is currently ongoing and pending determination.
5. That the inclusion of the 1st Respondent herein is ill advised on the premise of acts or omissions on the part of the 2nd Respondent herein; and that any allusions of unlawful conduct by the 1st Respondent is misinformed by conjecture and misconceptions of facts by the Appellant.
6. That the relationship, engagements and actions of perceived collusion and cooperation between the 1st and 2nd Respondents herein at all times material to this suit, including but not limited to the alleged infringement of personal privacy; were sanctioned by applicable law, including judicial orders issued in **MILIMANI MISCELLANEOUS CRIMINAL APPLICATION NO. 3527 OF 2017, SERIOUS CRIME UNIT (KPLC) THROUGH NPS VERSUS SAFARICOM**.
7. That no punitive lawful action can be brought against the 1st Respondent for its compliance with, and adherence to applicable law, including judicial orders issued in **MILIMANI MISCELLANEOUS CRIMINAL APPLICATION NO. 3527 OF 2017, SERIOUS CRIME UNIT (KPLC) THROUGH NPS VERSUS SAFARICOM**.
8. That none of the documentary evidence tendered in support of the Appellant's case originated from the 1st Respondent herein, and are irredeemably unreliable as they are not a true and authenticated representation of the true facts of this matter.
9. That the suit as against the 1st Respondent herein has been instituted with the ulterior motive of gaining unwarranted collateral and/or pecuniary advantage, which is a blatant abuse of this Court's process.

IT IS proposed to ask the Court for the Orders that-

- 1) It be ordered, determined and declared that the Appellant's case against the 1st Respondent is subjudice, as its cause of action is being canvassed in **ELRC NO. 157 OF**

2018, ELDORET, CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED, which is currently ongoing and pending determination.

2) In the **alternative to prayer 1 above**, a declaration be and is hereby issued that the 1st Respondent herein was wrongly enjoined to this suit; and that its name be struck off, allowing the Appellant to prosecute the matter as against the lawfully liable persons; and further that the suit as against the 1st Respondent be dismissed with costs.

3) In further alternative to prayer 1 above, it be declared and issued orders for stay of the proceedings herein, pending the conclusive hearing and determination of **ELRC NO. 157 OF 2018, ELDORET, CHARLES ONCHARI OGOTI VERSUS THE KENYA POWER & LIGHTING COMPANY LIMITED.**”

Submissions on the appeal

[5] The principal arguments of the parties to the appeal were set in their respective written submissions. For the appellant it was urged in support of the appeal and in opposition of the cross – appeal that:

“APPELLANT’S WRITTEN SUBMISSION

- Your lordship, a look at the notice of Preliminary Objection filed by the 1st respondent reveals that the four (4) grounds mainly consisted issues of facts!
- The appellant submits that what the 1st respondent was doing was an anomalous attempt of disposing of the matter through a Preliminary Objection. The Preliminary Objection did not raise clear points of law fit for consideration as a Preliminary Objection. Why do we say so?
- Your lordship, considering ground 1 of the notice of Preliminary Objection; there are allegations that there are parallel proceedings with the instant suit involving the same parties; the appellant submits that, that is not an issue that the Court determine without looking into facts. How could the Court determine the issues raised therein without interrogating the said proceeding?
- The trial Magistrate holding on this issue was as follows: **(See page 222 paragraph 4 – 7 of the record of appeal)**

‘The 1st ground in the notice of Preliminary Objection is with regard to whether the proceedings in this case are parallel proceedings in **ELRC NO. 157 OF 2018 Eldoret** raises a question of subjudice which is a point of law since, it has the potential of determining this matter with finality without the need of ascertaining additional facts. (Emphasis ours)
- Nothing could be further from the truth. The trial Magistrate erred in trying to interrogate the pleadings as filed without putting into consideration all the issues. What was the basis of the trial’s Magistrates holding that the appellant’s case against the 2nd respondent was ‘sub-judice’?
- The case filed at Kabarnet i.e. Kabarnet Cmcc no. 33 of 2018 was about breach of privacy by the 1st respondent and 2nd respondent while the one filed at the Eldoret employment and labour relations Court was about unlawful termination. These are very different cause(s) of action. The parties in the Kabarnet case and the matter filed at the Eldoret Employment and Labour Relations Court were different.
- The trial Magistrate delved into issue of facts in making the decisions that the suit against the 2nd respondent was sub-judice. What informed the trial Magistrate?

· Preliminary Objection should be concise and specific. Preliminary Objection should only be confined on points of law and should be shrouded on mystery that cannot be discerned from the pleadings.

· The fact that the 1st respondent sought leave to file an affidavit in support of the Preliminary Objection and in fact filed the same; gives credence to our submissions and position that there was no Preliminary Objection before the Court. The 1st respondent sought to introduce evidence by way of an affidavit in support of the Preliminary Objection.

This was wrong!

· The issue of whether or not there were parallel proceedings whether or not Mpesa transactions were prepared by a third party, whether or not the suit is an abuse of Court Process cannot be raised by way of a Preliminary Objection!

· Those issues required and/or necessitated the filing of an application that would afford the parties an opportunity to respond to all the issues of facts alleged by the parties.

· The legal position regarding Preliminary Objections was well laid down in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696.**

· The Preliminary Objection raised herein is blurred with factual details and the 1st respondent sought to introduce evidence by way of an affidavit in support of the Preliminary Objection that would require intense investigation by the Court. This was unacceptable.

See holding in: **MEHBU GELAN KELIL ANDOTERS VS ABDUL KADIR SHARRIF ABDIRHIM AND OTHERS (2015) eKLR**

· The Preliminary Objection raised herein apart from the same being blurred and murred with factual issues; it is also vague. An averment that the suit is bad in law, misconceived and disclosed no reasonable cause of action cannot be entertained and sustained through a Preliminary Objection.

In **AGNES MUKAMI AND 5 OTHERS VS NGEWAHI AND COMPANY (2005) eKLR**

‘...A clear and well taken Preliminary Objection may expedite disposal of matters before a Court on the other hand a vague Preliminary Objection often causes delay in determination of matters’

We need not say much.

· The Appellant submits that the Preliminary Objection was not a competent Preliminary Objection as provided under the law and in any event, the same did not raise clear points of law that are not contested.

WITHOUT PREJUDICE TO THE AFOREGOING

3(b) Ground 2 of the appeal (which is ground 3 of the Memorandum of Appeal) Was the trial magistrate wrong in holding that the issues in dispute in Eldoret Employment and Labour Relations Court in No. 157 of 2018 were substantially the same as in Kabarnet Cmcc no. 33 of 2018?

· As indicated in our earlier submissions it was impossible for the trial magistrate to have arrived at the conclusion she did had she not considered issues of facts that were raised by

the 1st respondent.

· This Honourable Court should not lose sight of the fact that the 1st respondent moved the Court by way of Preliminary Objection, not an application. The issues of facts that we later on introduced by way of an affidavit in support of the Preliminary Objection were improperly introduced in Court. Why do we say so?

· There is no provision in law that allows the filing of an affidavit in support of a Preliminary Objection. The filing of an affidavit in support of the Preliminary Objection by the 1st respondent defeated the Preliminary Objection and the purpose of the Preliminary Objection filed.

· The trial's Court on this issue was as follows (We quote)

'In both pleading above the plaintiff seeks damages for breach of contract that arose after the arising out of Court an employer and employee relationship between the plaintiff and 2nd defendant in both Courts. The claim for breach of contracts substantially in issue on both cases. Section 6 of the Civil Procedure Act states that...' **(See page 223 paragraph 2 of the record of appeal).**

· With all due respect to the trial magistrate, the appellant submits that she was wrong! The Court's finding was based on the shallow information that had been provided in the affidavit in support of the Preliminary Objection.

· In the appellant's submissions to the Preliminary Objection, the issue was contested. The appellant was not afforded an opportunity to contest the issues of facts contained in the purported affidavit in support of the Preliminary Objection. It was therefore wrong for the trial Magistrate to put reliance of facts which are were one-sided.

· That notwithstanding, the Court's holding that the appellant's suit against the 2nd respondent as subjudice was wrong. The parties in the two cases were different. The cause(s) of action were different.

· The case filed before the sub-ordinate Court at Kabarnet was about breach of privacy. Without going into the merits of both cases; we invite this honourable Court to look at the prayers contained in the two cases. They are totally different (See page 93 of the record of appeal) for the prayers in ELDORET ELRC NO. 157 OF 2918 and (see page 63 of the record of appeal) for the prayers in Kabarnet civil case no. 33 of 2018.

· We therefore urge this Honourable Court to find that the trial magistrate had no basis to strike out the appellant's suit against the 2nd respondent for being sub-judice!

· Your lordship, even if the suit against the 2nd respondent was subjudice (which we submit was not), the recourse by the honourable magistrate was not to strike out the suit but to order a stay of the proceedings! And this would only happen and/or be the scenario if the Honourable Court was properly moved by way of an application so as to properly and correctly evaluate facts!

· In fact all the authorities contained in the submissions by the 1st respondent in support of the Preliminary Objection raised indicated what should happen in the event the Court held the suit was subjudice; the proceedings are stayed not struck out!

· The right to be heard is one of the cardinal principles that underpins the rule of law.

3(c) **Ground 3: which is ground 4 of the Memorandum of Appeal Whether or not the trial**

Magistrate was right in striking out the appellant's suit against the 2nd respondent?

- The Preliminary Objection filed on 6/7/2018 (which is the subject to the appeal herein) was filed by the 1st respondent.
 - The 1st respondent is the one who alleged that the suit against it was 'subjudice'
 - The 2nd respondent did not complain or raise any issues, Preliminary Objection and/or even challenge the competence of the appellant's suit. Basically, the 2nd respondent did not move the Court for any orders.
 - The trial magistrate held: See page 223 of the record of appeal
- 'The 1st defendant is not a party on **ELRC NO. 157 OF 2018; CHARLES ONCHARI OGOTI VS THE KENYA POWER AND LIGHTING CO. LTD** are not in issue in ELRC NO. 157 OF 2018. Therefore the suit as against the 1st defendant does not offend section 6 of the Civil Procedure Act' (Emphasis ours)*
- The appellant submits that the trial magistrate having held as above should have dismissed the Preliminary Objection raised by the 1st respondent and ended there!
 - What was the basis of striking out the 2nd respondent's suit when the 2nd respondent had not moved the Court? The same way a Court cannot issue an order against a party who has not been heard is the same way a Court should not issue an order in favour of a party who did not seek the same!
 - The appellant dares to submit that it was the trial magistrate's misapprehension of what a Preliminary Objection that led to this; of allowing a party to file an affidavit in support of a Preliminary Objection, delving into issues of facts, making findings in favour of a party who sought no such order before it!
 - We therefore submit that the Preliminary Objection filed by the 1st respondent had not basis in law, was not a competent Preliminary Objection and should be dismissed with costs. The appellant also prays for costs of the appeal.
 - The appellant concluded by quoting **SIR CHARLES NEWBOLD (IN THE CASE OF MUKISA BISCUIT (SUPRA))** who stated;
- 'The improper raising of point by way of Preliminary Objections does nothing but unnecessary increase costs and on occasions, confuse the issue. This improper practice should stop''*

[6] The 1st respondent opposed the appellant's appeal and urged the cross appeal as follows:

"1ST RESPONDENT'S WRITTEN SUBMISSION

30. In the instant suit, the learned trial magistrate was of the opinion that the Preliminary Objection was valid hence successful, but held that the Appellant's claim was indeed extinguished, but only in so far as the same was against the 2nd Respondent herein. Your lordship, we humbly submit that this school of thought preferred by the trial magistrate was erroneous, and a departure from trite law on Preliminary Objection.

31. We humbly submit that proper determination of the 1st Respondent's Preliminary Objection, would serve to either extinguish the Appellant's claim herein in its entirety, or if

unsuccessful, would see the suit in its entirety, against both Respondents, sustained to trial. The 1st Respondent humbly submits that the learned trial magistrate's determination implies that the Preliminary Objection only partially successful, casting aspersions on the holding of the learned Chief Justice, as he then was, a reversal of the proper application of the doctrine of stare decisis.

32. The 1st Respondent humbly invites this honorable Court, to appreciate that by their very nature, Preliminary Objection, where successful, are fatal to a suit, and such is the case also where the suit has more than one Respondent. In addition, it is trite law, inferred from customs, usages and judicial precedents, that parties held jointly liable in a claim, may jointly benefit from orders even where they did not seek such orders, provided that the trial Court deems such orders necessary for the expedient determination of a suit, as appears to be the case in the instant application.

33. We humbly urge this honorable Court to vacate the holding of the trial Court, and find that the 1st Respondent's Preliminary Objection was successful in extinguishing the Appellants claim in its entirety, as against both Respondents."

[7] The 2nd respondent supported the decision of the trial court in submissions as follows:

"2ND RESPONDENT'S WRITTEN SUBMISSION.

Analysis

10. On the issue of Subjudice the Court highlighted Section 6 of the Civil Procedure Act and found that the suit offends this provision as the claim for breach of contract mentioned in **Eldoret is ELRC NO. 157 of 2018 and Kabarnet Cmcc No. 33 of 2018 (Page 90 – 93 of Record of Appeal).**

11. In support of the ruling we rely on the case **Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga [2013] eKLR** in which Justice Olao held that;

"It is not the form in which the suit is framed that determines whether it is sub-judice. Rather it is the substance of the suit and looking at the pleadings in both cases,and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which requires under Section 1B that there be an "efficient use of the available judicial and administrative resources".

Having considered all the above, I am satisfied that the plea of sub-judice as properly been invoked in this case."

12. To outline further on the issue of subjudice in respect to both matters:

a. The Plaintiff has filed a suit in the Employment and Labour Relation Court at Eldoret being ELRC No. 157 of 2018, Charles Onchari Ogoti –vs- Kenya Power & Lighting Co. Ltd. The parties in the said suit are substantially the same as those in Kabarnet Cmcc No. 33 of 2018 save that the 1st Defendant is not a party to the former suit. The parties are litigating under the same title before a Court of competent jurisdiction and the same has not been determined.

b. The matter in issue **Kabarnet Cmcc No. 33 of 2018** is directly and substantially similar to **Eldoret ELRC No. 157 of 2018**. The two actions are intertwined as mentioned in paragraph 14A of the Amended Plaintiff. Both matters are interlinked

because they arose as a result of breach of contract.

c. The appeal is an abuse of Court process due to the fact that there is a close linkage of issues in the two actions, it follows that the two lower Court suits may have similar interpretation from the Courts if they are heard separately. This would also mean that the evidence submitted by parties will be duplicated in both cases.

13. therefore, it is the 2nd Respondent's humble submission that the trial Court was not capricious in her exercise of judicial discretion by hearing and making a determination on the Preliminary Objection and this Honourable Court should not interfere with the same as the ruling was well founded. We rely on the Court of Appeal case **Child Welfare Society of Kenya Vs Republic, Exparte Child in Focus Kenya & AG & Others [2017] eKLR** as Waki, Nambuye & M'noti JJA held as follows, citing **Mbogoh & Another Vs Shah [1968] EA 93**, on the power of the appellate Court in matters discretion exercised by the Court reiterated **Sir Clement De Lestang V-P** who stated thus:

“I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

ii) **Whether the Appeal has merit.**

14. Section 75 of the Civil Procedure Act as implemented by Order 43 of the Civil Procedure all espouse this issue of which decrees/orders can be appealed from as a matter of course of right. What the above provisions espouse is that not often does a losing party have or enjoy an automatic right of appeal, to have the decision of the Court making the decision reversed by a superior Court. In other words, there is no absolute right of appeal for all decisions rendered by a Court.

15. The appellant filed their Memorandum of Appeal dated 18th February 2019 seeking prayers that:

a) The appeal herein be allowed and an order be made setting aside the subordinate's Court's decision/order striking out the Appellant's suit against the 2nd Respondent and substitute the same with an order dismissal the 1st Respondent's Preliminary Objection dated 6th July 2018.

b) The Appellant's case against the 2nd Respondent be reinstated and matter be ordered to proceed on its merits.

c) The Appellant prays for costs of the appeal.

16. In **K.C.B Ltd v Tony Manaseh Esipiya C.A. Case No. 105 of 1998** the case in **G.R. Mandaria v Rattan Singh (1965) E.A.** was referred to where the Court said:

“Where a Preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails and a suit permitted to proceed, no preliminary decree arises but only an order. The unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.”

17. Noting that the Court partially allowed the 1st Respondents Preliminary Objection by striking out the 2nd Respondent and ordering that the Lower Court suit proceed against the 1st Respondent it follows therefore that the Appellant herein ought to have sought leave to

file an appeal against the order being challenged with the Court of first instance, either orally at the time of making of the order of 14 days from the date of that order and this was not sought.

18. And since no such application was made in the Court of first instance the Applicant has no right of appeal as the same accrues from leave. The law specifically states where the leave was to be sought at first. Certainly, this is not the right forum. The right of appeal has not accrued; the Memorandum of Appeal is not properly before Court; the process is wrong abinitio; and as such there is no competent appeal that is likely to succeed or upon which the orders being sought for would be anchored upon.”

Issues for determination

[8] The issues arising from the appeal and cross-appeal and submissions of the parties thereon are –

1. Whether there is a competent Preliminary Objection before the court;
2. Whether the present suit before the magistrate’s court is barred by the **sub judice** principle as against the defendants or any of them;
3. Whether the appeal, which is from the decision of the trial court on a Preliminary Objection and filed without leave of the court is competent before the appellate court.

Preliminary Objection procedure

[9] This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.** (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA.:

“So far as I am aware, 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 of the suit. Examples are **an objection on the jurisdiction of the court**, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

[10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of the Constitution of Kenya 2010.

[11] In case cited by the 1st Respondent, **David Nyekorach Matsanga & Another v. Philip Waki & 3 Others** [2017] eKLR, the three judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

34. We quickly turn to the question whether we have before us a Preliminary Objection proper.

Of Preliminary Objections

35. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696* has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR* also pellucidly captured the legal principle when it stated as follows:

1. “...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

This statement of the law has been echoed time and again by the courts: see for example, *Oraro –v- Mbaja [2007] KLR 141*.

36. In *Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* the Supreme Court stated that

“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”. [emphasis ours]

37. Much more recently, the Supreme Court again reconsidered the position of parties resorting to the use of Preliminary Objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR*.

2. “[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis ours]

38. The Supreme Court thus laid it clear that the focus ought to be both the purpose as well as the nature of the Preliminary Objection. If it will serve the public purpose of sparing the sparse judicial time and also militate against profligate deployment of time and other resources then the court ought to entertain the Preliminary Objection. Of course, there is also the rider and caution that disputes are better off being resolved judicially, than summarily.

39. The same theme seems to run through subsequent Supreme Court decisions. The strict approach in *Mukisa Biscuits’* case seems therefore to have been given less prominence. In the recent case of *Kalpana Rawal & 2 Others v Judicial Service Commission & 6 Others [2016] eKLR* the Supreme Court stated that the examples of jurisdiction and limitation given by law J.A in the *Mukisa Biscuits’* case were but only examples of two grounds worthy of preliminary hearing and that a checklist approach to the test as to whether a matter merited and fell under the *Mukisa Biscuits* case was not in consonant with the spirit and letter of the Constitution. The court then proceeded to state that where the Preliminary Objection raised a “fundamental issue” (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts.

40. Pursuant to Article 163(7) of the Constitution and with the requisite deference, we are obliged to adopt the more liberal approach by the Supreme Court.

41. We hold the view that when the 1stRespondent questions the 1stPetitioner's locus standing, it is a matter which ought to be resolved at a preliminary stage. Likewise, when the Respondents state that the 1stRespondent is immune from suits and further that the CIPEV is defunct and no suit against it may stand, then these are matters to be determined at a preliminary stage. **Likewise, questions of res judicata or sub judice are best resolved at the very inception of any suit and by way of Preliminary Objection, to avoid profligate litigation and save the scarce judicial time.**

Disputed Facts

[12] Indeed, the court found Preliminary Objection procedure to be inappropriate in cases of great moment and disputed facts save where the matter is governed by constitutional provision as follows:

42. As to whether a report or reports in the custody of the President or panel of eminent personalities ought to be released by another person, such are matters which ought not to be dealt with in a preliminary and summary manner.

Some undisputed facts

43. The nub of the Petition is basically an envelop ("the Envelope") handed over to the chair of the panel of eminent African Personalities by the 1stRespondent.

44. It is common cause that the 1stRespondent was the Chairman of the CIPEV. He was not alone. He had company in two other commissioners. They worked under clear terms of reference. They had time-lines. When the time-lines were not met, they were extended. A report was compiled by the CIPEV. It was exhaustive. It was handed over to the President of the Republic of Kenya. The report referred to the Envelope. The Envelope was handed over to the chair of the panel of eminent African personalities who apparently handed it over to the 2ndRespondent. The Petitioners want to access the Envelope or its contents. Their Petition is about the right of access to information as enshrined under Article 35 of the Constitution.

45. The right of access to information is one crucial right. Article 35 of the Constitution guarantees it. The Article reads:

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.
[emphasis added]

46. The right of access to information is now additionally promoted by the Access to Information Act 2016. International treaties and conventions have also always promoted the right of access to information.

47. Local jurisprudence on Article 35 and the enforcement thereof is clear and settled. In **Famy Care Limited v Public Procurement Administrative Review Board and Others [2013] e KLR** the court stated thus.

The right of access to information is one of the rights that underpin the values of good

governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”

48. The Court went on to state that;

The right of access to information is also recognized in international instruments to which Kenya is party. The Declaration of Principles of Freedom of Expression in Africa adopted by the African Commission on Human and Peoples’ Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples’ Rights which provides, “Every individual shall have the right to receive information.” The Commission noted that right of access to information held by public bodies and companies will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”

49. Then in *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 others* [2013] eKLR, the court made it clear that;

“... in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

However, this petition succeeds to the extent that I have found that the 1st respondent (Kenya Electricity Generating Company) has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a Constitutional obligation to provide the information sought.” (Emphasis added)

50. Enforcement of the right under Article 35, unlike other Bill of Rights Articles is limited to citizens. Only citizens have the locus, and not even juridical persons domiciled and incorporated in Kenya can claim or enforce this right.

51. In the context of the current case, it is not disputed that the 1st Petitioner is not a citizen of the Republic of Kenya. He is though a resident of East Africa. In our view, his claim cannot stand in view of the various decisions by the local courts and the rather stable jurisprudence they have established. As a non-citizen, the 1st Petitioner could not commence and sustain the instant Petition. We so hold.”

[13] For my part, I would respectfully agree that although the general principle is that as found by the Supreme Court in *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others* [2015] eKLR, that Preliminary Objection procedure should be invoked (as with *Mukisa Biscuits’ case*) where facts are not disputed, it may **“it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement [and] it is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”** This public interest cause of effective use of judicial resources may call for the use of Preliminary Objection procedure or in limine determination of disputed facts where facts are capable of quick resolution and may be established by consideration of the materials before the court without calling for further evidence. This is how, I think, the three-judge bench dealt on a preliminary point with the question of entitlement of a non-citizen to the right to information under Article 35 of the Constitution as set out above.

[14] This would also be the case where on a question of res judicata or sub-judice, only the respective pleadings and or judgment need be considered. Where there exists a complex dispute on the facts of the case, the matter ought to be resolved by normal full trial with evidence by viva voce examination or where appropriate, affidavit evidence. For purposes of presenting before the court of pleadings, and judgment in case of res judicata objection, in the previous suits, an applicant may well seek to introduce affidavit evidence.

Present suit

[15] The appellant's suit before the magistrate's court is set out in the Amended Complaint dated as follows:

"AMENDED COMPLAINT"

4 At all material times relevant to this suit the Plaintiff maintained an account with the 1st Defendant vide mobile telephone numbers 0720399599 and 0716247205 in which he used for all services provided by the 1st Defendant mobile money i.e Mpesa included therein.

5. At all material times relevant the Plaintiff was an employee of the 2nd Defendant working as a Technician on permanent terms.

6. The Plaintiff avers that his agreement with the 1st Defendant was governed by the Mpesa customer terms and conditions which he fully relies on herein.

7. The Plaintiff further avers that it was mutually agreed between parties that the 1st Defendant was obligated to treat the Plaintiff's information confidentially and not to disclose it to unauthorized third parties without the Plaintiff's written consent.

8. The Plaintiff states that between the period of November 2017 and January 2018 the 2nd Defendant colluded with the 1st Defendant to illegally, without any colour of right, unlawfully and in breach of contract obtain Plaintiff's private data including but not limited to Mpesa statements.

Particulars of illegality, unlawfulness and breach of contract by the 1st Defendant, its agents, employees and/or servants

a) Disclosing Plaintiff's private data and/or information to third parties without the Plaintiff's written consent.

b) Breaching the terms of contract.

c) Colluding with third parties including the 2nd Defendant to unlawfully release the Plaintiff's private data/information.

d) Failing to safeguard the Plaintiff's right to privacy.

e) Allowing unauthorized access of the Plaintiff's personal information.

f) Failing to maintain its duty of non-disclosure.

g) Breaching its duty of confidentiality.

Particulars of illegality, unlawfulness fraud and breach of contract on the part of the 2nd Defendant, its agents, employees and/or servants

- a) *Illegally and fraudulently obtaining the Plaintiff's private data and/or information.*
- b) *Acting in bad faith and actuated by malice.*
- c) *Acting in collusion with the 1st Defendant and/or its agents employees and/or servants to obtain Plaintiff's private data and/or information.*
- d) *Possessing the Plaintiff's private data without his consent.*
- e) *Sharing illegally obtained Plaintiff's private data/information with other third parties.*

9. *That the Defendants' actions amount to breach of contract and infringement of Plaintiff's right to privacy and the said breach of contract."*

[16] *The 1st respondent's defence to the suit was principally as follows:*

"1ST DEFENDANT'S STATEMENT OF DEFENCE

5 *The 1st Defendant in response to paragraph 6 & 7 of the Amended Plaint states that despite the 1st Defendant upholding confidentiality with all its subscribers, the present claim against the 1st Defendant is misplaced and the Plaintiff is put to strict proof thereof with regard to breach of any Mpesa terms and conditions.*

6 *The 1st Defendant denies the contents of paragraph 8 of the Amended Plaint and the particulars of illegality, unlawfulness and Breach of contract and the Plaintiff is put into strict proof thereof.*

7 *The 1st Defendant joins issue with the authenticity of the alleged Mpesa statements annexed to the Plaintiff's List of documents in its Amended Plaint as they do not conform to any known format of MPESA statements provided by the 1st Defendant.*

8 *The 1st Defendant states that the Plaintiff has materially misstated and misrepresented the facts giving rise to the claim against the 1st Defendant and in particular, the Mpesa statements adduced do not give rise to particulars of breach of duty.*

Particulars of Mis-statement and Mis-representation

1. *The Plaintiff has failed to obtain sufficient and reliable data, information and/or Mpesa statements to enable him to draw reasonable conclusions there from.*

2. *The Plaintiff has failed to take reasonable care in the presentation of private data, information and/or Mpesa statements which did not emanate from the 1st Defendant.*

3. *The Plaintiff's averment that the 1st Defendant supplied and colluded with the 2nd Defendant to release the Plaintiff's private data, information and/or alleged Mpesa statements.*

9 *The 1st Defendant avers that it therefore did not breach and/or disclose any data as alleged.*

10 *The 1st Defendant further states that the Plaintiff has a duty to disclose where it obtained the alleged Mpesa statements and the lack of security features thereof.*

11 The 1st Defendant further states that Plaintiff averments are mere allegations which are laced with malice and aimed at tainting the 1st Defendant's image as a respected Telecommunication Company in Kenya.

12 The 1st Defendant avers that it did not engage in any arbitrary conduct towards the Plaintiff and has always acted in a professional manner by safeguarding the interest and privacy of its customers."

[17] The 2nd respondent's defence was pleaded as follows:

“DEFENCE

6. THE 2nd Defendant denies the contents of paragraph 8 of the Amended Plaintiff in its entirety particularly that between the period of November 2017, and January, 2018 the 2nd Defendant colluded with the 1st Defendant to illegally, without any colour of right, unlawfully and in breach of contract obtained the Plaintiff's private data including but not limited to M-pesa statements.

7. THE 2nd Defendant further denies the particulars of illegality, unlawfulness and breach of contract by the 1st Defendant, its agent, employees and/or servants set out in the Amended Plaintiff. The Plaintiff is invited to strict proof thereof.

8. In the alternative and without prejudice the foregoing, the 2nd Defendant avers that if indeed the 2nd Defendant accessed the Plaintiff's private data.

a) There was presence of a ground of justification hence the invasion of privacy was not wrongful.

b) The ground for invasion of privacy falls within the instances where the law envisages the right to privacy may be limited.

9. THE 2nd Defendant denies the contents of paragraph 9 of the Amended Plaintiff particularly that the Defendants action amount to breach of contract and infringement of Plaintiff's right to privacy and said breach of contract. Strict proof is invited."

[18] The appellant's suit before the Employment and Labour Relations Court was an action for wrongful dismissal as pleaded in the Amended Statement of Claim therein as follows:

“AMENDED STATEMENT OF CLAIM

3 At all material times to this claim the Claimant was an employee of the Respondent working as a technician on permanent terms and salary scale of MG13 in the distribution division (projects) with a salary of Kshs.88,898/= per month and house allowance of Kshs.26,168/= per month.

4 On or about the 30th day of January 2018; the Claimant's services were terminated by the Respondent by way of summary dismissal.

5 The Claimant avers that the Respondent wrongfully dismissed the Claimant when it maliciously and without reasonable/justified cause arrived at a determination that the claimant had direct associations or connection of at all with Samcar Ltd (one of the Respondents labour and transport (L & T) contractors and/or any other Respondents contractor.

6 The Claimant also avers that the Respondent wrongfully dismissed him on unsubstantiated claims that one of the directors of the 1st contractor (Samcar Co. Ltd) is his spouse yet that was not the

case hence prejudicing the Claimant.

7 The Claimant further states that the respondent on various dates between the period of November 2017 and January 2018 maliciously unlawfully, illegally and without any colour of right obtained his private data including but not limited to Mpesa statements for his accounts which it used to unlawfully and wrongfully dismiss him from employment.

8 The Respondent also wrongfully dismissed the Claimant when it maliciously and without any reasonable or justifiable cause and without conducting proper investigation made a determination that the Claimant had submitted documents for payments for schemes that were never implemented by the L & T (labour and transport) contractors.

9 The Claimant states that the Respondent Company had put in place procedure in the project department such that all schemes were being awarded by an awarding committee to which the Claimant wasn't a member and upon them being awarded they were implemented by the Deputy Regional Manager.

10 The Claimant also adds that there was a system of checks and balances in place in that no payment would be made to any contractor before the relevant project engineer or manager confirms completion of the allocated project.

11 Consequently the Claimant avers that the allegations against him as grounds for dismissal are baseless, unjustified, unsubstantiated, malicious and unreasonable.

12 The Claimant avers that the summary dismissal was unlawful, unjustified, unprocedural, illegal, wrongful and unfair for the following reasons;

Particulars of unlawfulness, unfairness and/or illegality and breach of contract

- a) The dismissal is made in bad faith and orchestrated with malice.
- b) Unlawfully and wrongfully dismissing the Claimant.
- c) Dismissing the Claimant without any reasonable cause and/or justified cause or at all.
- d) Dismissing the Claimant contrary to the Provisions of the constitution, Employment Act, principles of natural justice and all other relevant Laws.
- e) Being unfair and unreasonable in the circumstances.
- f) Acting on assumption and unfounded allegations.
- g) Acting in bad faith.
- h) Breaching the contract of employment.
- i) Failing to conduct proper investigations.
- j) Illegally obtaining Claimant's private data and/or information.
- k) Unprocedurally dismissing the Claimant
- l) Colluding with auditors and other employees of the Company to sack the Claimant without any lawful excuse.

13 The Claimant hence seeks for a declaration that the said summary dismissal be declared

unlawful and an order of immediate reinstatement be issued.

14 That as a result of the illegality, breach of contract and unlawfulness of the Respondent, the Claimant suffered substantial loss and damage.

15 A. That there is no other suit pending and that there have been no previous

proceedings in any Court between the Claimant and the Respondent over the same subject matter and that the cause of action relates to the Claimant named in the Amended Statement of claim save that there is a suit pending in Kabarnet Cmcc No. 33 of 2018 between the Claimant and the Respondent and Safaricom Ltd in which the Claimant is seeking damages for breach of contract and breach of privacy from Safaricom Ltd and the Respondent.

16 The Claimant hence prays for damages for breach of contract, payment of salary and other benefits from the date of dismissal.

17 The Claimant also prays that he be compensated for wrongful dismissal at the equivalent of twelve (12) months gross salary.”

[19] In the present case, the issue whether the present suit is sub judice, although that could be raised by an application by Motion on Notice could also be resolved by mere examination of the pleadings before this court and the previous suit filed before the Employment and Labour Relations Court (E&LC) at Eldoret.

[20] I would readily agree that an objection in the nature of **sub judice** is a point of law which may be taken as Preliminary Objection or argued by its very nature in limine because its effect, if successful, is to **stay** further proceedings in the suit. If not determined at a preliminary stage, its impact as a remedy is well rendered nugatory. It is akin to an objection as to **jurisdiction**, within the meaning of the remedy of Preliminary Objection simpliciter, because, the contention by the mover of the Preliminary Objection based on sub judice is that the court lacks jurisdiction in the words of section 6 of the Civil Procedure Act “**to 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....”

[21] In addition, on the test in **Mukisa** that the pure point of law does finally resolve the dispute between the parties, an order of stay rests the case in the pendency of the previous suit, and it must be taken to finally resolve the issue between the parties because the court has no jurisdiction to proceed with the suit.

Appeals from decrees as a matter of right

[22] Section 65 (1) (b) of the Civil Procedure Act provides for appeals as a matter of right from original decrees of the subordinate court on a question of law or fact. A **decree** is defined under section 2 of the Civil Procedure Act as “the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may either be preliminary or final; it includes the striking out of a plaint”

[23] Order 43 Rule 3 of the Civil Procedure Rules on **appeals from Orders** restates the position as regards appeals from decrees by providing that –

“3. Nothing in this Order shall apply to any adjudication which, **as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.**”

[24] In its determination that the Preliminary Objection on sub judice succeeded with respect to the appellant’s suit against the 2nd respondent, the trial court made an “adjudication which, as regards the court expressing it, conclusively determines the rights of the parties” from which the appellant could appeal as of right under section 65 (1) (b) of the Act and Order 43 (3) of the Civil Procedure Rules.

Section 75 (1) (h) of the Civil Procedure Act, which applies to appeals from orders made under the Rules which expressly allow appeal, as of right or with leave of the Court, has no application to this matter. The objection to the appellant's appeal thereon by the 2nd respondent is, therefore, rejected.

*Whether suit **sub judice** by virtue of the Eldoret E&LRC suit No. 157 of 2018*

[25] The present suit from which the appeal arises relates to a cause of action for breach of right to privacy and breach of contract based on alleged violation of right to confidentiality under the appellant's contract with the 1st Defendant/Respondent herein. The 2nd defendant is sued for his alleged role in collusion with the 1st respondent in the breach of privacy. The tort of breach of confidence may arise out of contract, an pre-existing relationship or independent of a pre-existing relationship as observed in **Clerk and Lindsell on Torts** 19th ed. London (Sweet & Maxwell) 2006 at paragraph 28-12 p. 1780 as follows:

*“28-12 Confidentiality independent of a pre-existing relationship However, it has become clear (especially since the judgment of Lord Goff in **Att-Gen v Guardian Newspapers Ltd (No.2)** (1990) 1 AC 109 that a duty of confidentiality may arise independently of any pre-existing relationship. **Where a person obtains obviously confidential information, either deliberately or accidentally, an obligation of confidence may arise.** Examples include: discovery of a private diary dropped in a public place, taping confidential material said in a private telephone conversation, taking a photograph of a closed and secret film. In such cases, though the Court sometimes highlights improper behavior on the part of the defendant, the duty of confidence arises from the nature of the information itself. This is most clearly the case where personal information is concerned and indeed where personal information is concerned the approach in **Coco v. A.N. Clark (Engineers) Ltd** has been replaced by a two-stage inquiry: was this personal information (see para. 28-10, above) and, on the facts, which of the competing rights: to privacy and to expression outweighs the other.”*

[26] The 1st Respondent is not a party to the employment suit before the Employment & Labour Relations Court where damages for breach of the contract of employment between the appellant and the 2nd defendant are sought.

[27] The trial court properly considered the objection as to **sub judice** as being in the nature of a point of law which may resolve the dispute between the parties but erred in considering the two suits are similar for seeking the relief of damages for breach of contract, without distinguishing which contractual terms applied to each case. In the present case it the service provider contract between the mobile telephony provider 1st respondent and the appellant while the contract between the appellant and the 2nd Defendant is the contract of employment, which has nothing to do with the mobile telephone service contract. The causes of action are different in the two suits. The trial court determination as to the applicability of **sub judice** principle to the suit against the 1st respondent cannot be faulted.

[28] With tremendous respect to the learned trial court, the holding in paragraph 12 and 14 of the Ruling subject of this appeal, that “xxx” and therefore “yyy”, is plainly wrong within the meaning of the test for appellate interference with the decision of the trial court set out in **Mbogo v. Shah** (1968) EA 93 and the decision cited by the 2nd respondent. The causes of action in the two suits Kabarnet SPMCCC NO. 33 of 2019 and Eldoret E&LRC NO. 157 of 2018 are for damages for breach of contract for provision of mobile service and breach of confidentiality and privacy, and damages for breach of contract of employment, respectively.

[29] The cause of action against the 2nd defendant appears to be, not merely a breach of contract of employment, but also tortious claim that *“the 2nd defendant colluded with the 1st defendant to illegally, without colour of right, **unlawfully** and in breach of contract **obtained Plaintiff's private data including but not limited to Mpesa statements.**”* (See paragraph 8 of the Amended Plaintiff). The causes of action in the two suits are different and the principle of **sub judice** does not, therefore, apply. The ruling of the trial court in this regard must be set aside.

The cross-appeal

[30] For the reasons discussed above, the cross-appeal by the 1st respondent seeking the determination that the appellant's suit is ***sub judice*** in respect of the two respondents and not just the 2nd respondent is declined.

Merits of the case

[31] The court is not required to determine the respective merits of the parties' cases at the Preliminary Objection stage. Questions whether the magistrate's court has under section 8 of the Magistrate Court's Act 2015 the necessary human rights "***jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights***" in this case the constitutional right to privacy under Article 31, and whether the suit in the Magistrate's court there is merit in the joint causes of action in contract for breach of contract and the tort of breach of privacy/confidence under specific contractual relationship or confidentiality dependent or independent of pre-existing confidential relationship (see ***Clerk and Lindsell on Torts***, 19th ed. Sweet & Maxwell, 2006 at p. 19, 1779 1786) fall to be determined at the hearing. The same for the objections taken in the Notice fo Cross Appeal as to the competency of the suit for the conduct which the 1st respondent alleged was "***sanctioned by all applicable laws, including but not limited to statute and judicial orders***" and for the reason that "***the 1st respondent herein is alien to any pre-existing relationship between the appellant and the 2nd respondent herein.***"

Conclusion

[32] Be that as it may, the 1st respondent being not a party to the employment suit before the Eldoret E&LRC means that the cause of action against it cannot be adjudicated in that suit, and, moreover, this suit is, therefore, not a suit between the same parties as the parties in the previous suit Eldoret E&LRC No. 157 of 2018. As regards the 2nd respondent who is the same party as in the previous suit, the different causes of action oust the principle of *sub judice*, which does not, therefore, apply to this suit.

Orders

[33] Accordingly, for the reasons set out above, the court makes the following orders:

- 1. The appellant's appeal is allowed.**
- 2. The 1st respondent's cross-appeal is rejected.**
- 3. The trial court's ruling, order and decree of 13th February 2019, the subject of the appeals herein, are set aside.**
- 4. The appellant's suit herein Kabarnet S.P.M.C.C.C. NO. 33 of 2018 against the 1st and 2nd Respondents shall proceed to hearing on dates to be fixed in consultation with the parties before the trial court.**

[34] The costs of the appeal shall be costs in the suit.

Order accordingly.

DATED AND DELIVERED THIS 22ND DAY OF JANUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Onyinkwa & Co. Advocates for the Appellant.

M/S Meritad Law Africa LLP. Advocates for the 1st Respondent.

M/S Kibichiy & Co. Advocates for the 2nd Respondent.