



**Progressive Credit Limited v Mathenge & 2 others (Environment and Land Appeal E043 of 2022) [2023] KEELC 22211 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22211 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E043 OF 2022  
CK NZILI, J  
DECEMBER 13, 2023**

**BETWEEN**

**PROGRESSIVE CREDIT LIMITED ..... APPELLANT**

**AND**

**ZABLON MATHENGE ..... 1<sup>ST</sup> RESPONDENT**

**NAOMI MUKIRI ..... 2<sup>ND</sup> RESPONDENT**

**ANFIELD AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of Chief Magistrate's Court at Meru  
Hon. Njoroge – CM in Meru ELC No. E024 of 2022 delivered on 6.7.2022)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent in the appeal took out a loan of Kshs.7,000,000/= from the appellant, which he secured with a motor vehicle and L.R No. Ntima/Igoki/9926. After falling into arrears, the appellant instructed the 3<sup>rd</sup> respondent to auction the securities. It triggered the filing of suit No. HCC No. E004 of 2022, where the 1<sup>st</sup> respondent complained that the appellant had breached the loan agreement in interfering with the running of his business, by trying to repossess his motor vehicle and auction the land for non-existent or exaggerated interest, yet he was faithfully servicing the loan. He sought for a declaration that the interest was illegal, that the maximum loan should not be beyond Kshs.14,000,000/= and an order of permanent injunction barring and restraining the appellant from realizing the securities.
2. As the 2<sup>nd</sup> defendant at the lower court, the appellant filed a preliminary objection dated 22.4.2022 stating that the suit was sub-judice Meru HCCC No. E004 of 2022 and Meru EMCC No. 212 of 2020.
3. Following directions, both parties filed written submissions dated 6.6.2022 and 17.6.2023, respectively.



4. By a ruling dated 6.2.2022, the trial court dismissed the preliminary objection. The appellant challenges the ruling because the trial court should have upheld the preliminary objection.
5. In support of the grounds of appeal, the appellant relies on written submissions dated 1.11.2023. It was submitted that the previous suit had sought to stop the appellant from realizing the securities proclaimed by the 3<sup>rd</sup> respondent, which had been dismissed by a ruling dated 2.7.2021, in an earlier matter which was marked as closed on 10.2.2022. As if that was enough, the appellant submitted Meru HCC No. E004 of 2022 against 24.2.2022, which matter was marked as settled on 15.3.2023.
6. The appellant submitted that on 4.3.2022, the suit appealed against and an application for realization of security were filed.
7. With this background, the appellant submitted that the main issue that cuts across all the suits is the facility that was extended to the 1<sup>st</sup> respondent and the securities offered as collateral, which, in all the suits, the 1<sup>st</sup> respondent has been seeking for prayers to bar the appellant from realizing the said collateral.
8. The appellant submitted the fundamental question is: What mischief did the two doctrines of res judicata and sub-judice intend to cure? And if so, have the two doctrines succeeded in curing such mischief concerning the 1<sup>st</sup> respondent, who has filed multiple suits and has mastered the art of metamorphosing the suit into various forms to suit his unjust endeavors of barring the execution of adverse orders issued against him to beat the requirements of the two doctrines. The appellant submitted that the law provides numerous ways to avoid offending the doctrines, such as joining parties and amending pleadings, but the respondents herein have decided to file different matters relating to the same cause of action and subject matters.
9. Therefore, the appellant submitted that the respondent's conduct offended the doctrines of res-judicata and sub-judice. Reliance was placed on *Onyango vs Ochieno* (2023) KEELC 1998 (KLR) 18<sup>th</sup> July (2023) Ruling, which cited with approval *John Florence Maritime Service vs Cabinet Secretary for Transport & Infrastructure & others* (2015).
10. The court has read through the pleadings before the trial court, grounds of appeal and the submissions by the appellant. This appeal turns on whether, based on the pleadings and material before it, the trial court was justified in finding that the 1<sup>st</sup> respondent's suit was properly before it.
11. As an appellate court of the first instance, the court should re-look afresh, reappraise, re-hear the lower court record, and develop independent findings on facts and law. See *Peter vs Sunday Post Ltd* (1958) E.A 424 and *Abok James Odera T/A A. J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR.
12. As per the lower court record, the primary pleading before the trial court was the plaint dated 4.3.2022, filed by the 2<sup>nd</sup> respondent as the legal wife of the 1<sup>st</sup> respondent, alleging that the suit land was her matrimonial home. She complained that the property was fraudulently and secretly charged to frustrate and defeat her matrimonial rights, despite her occupation or possessory rights. The 2<sup>nd</sup> respondent termed the intended public auction for 4.3.2021 illegal for lack of a 3-month and 45-day redemption notice. She sought a permanent injunction. The suit was accompanied by a notice of motion dated 4.3.2022, seeking interim injunction orders. The orders were issued *ex parte* on 4.3.2022 pending inter parties on 21.3.2022.
13. Attached to the preliminary objection was a certificate of urgency, which the 1<sup>st</sup> respondent had filed in the High Court, the plaint, a list of witnesses' and witnesses' statements dated 24.2.2022. Additionally,



the appellant attached a certificate of urgency and plaint dated 3.9.2020, a ruling dated 2.2.2021, and a certificate of urgency application dated 22.11.2021.

14. In *Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors (1969) E. A 696*, a preliminary objection, was defined as consisting of a point of law which has been pleaded or which arises by clear implication out of pleadings argued on the assumption that all the facts pleaded by the other side were correct. The court said a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought was in the exercise of judicial discretion. The court further said the improper raising of preliminary objections increases costs and, on various occasions confuses the issue and that such improper practice should stop.
15. In *Registered Trustees of the Catholic Diocese of Nyeri & another vs Standard Ltd & others (2003) 1 E. A P 253*, the court said preliminary objections should be raised at the beginning of the hearing.
16. In *Oraro vs Mbaja (2005) 1 KLR 141*, the court said a preliminary objection is a point of law that should not be blurred with factual details liable to be contested and, in any event, to be proved through evidence.
17. As to the manner of raising a preliminary objection in *Zipporah Njoki Kangara vs Rock and Pure Ltd & others (2021) eKLR*, the court said a preliminary objection may be brought at any time but at least before the conclusion of the case or at the earliest opportunity.
18. In *Aviation & Allied Workers Union of Kenya vs Kenya Airways Ltd and others (2015) eKLR*, the court said a preliminary objection may only be raised on a pure point of law and that to discern a pure point of law, the court has to be satisfied that there is no proper contest as to the facts and that the facts are deemed agreed as presented in the pleadings before court.
19. In *BWM vs. JMC (2018) eKLR*, the court said that for a preliminary objection to succeed, the facts should not be contested as pleaded by one party and admitted by the other. In *David Sironka Ole Tunkai vs Francis Arap Muge and others (2014) eKLR*, the court said that in an adversarial system, parties are the ones who set the agenda through their pleadings. See also *IEBC vs Mutinda Mule (2014) eKLR*. It is through pleadings that parties plead facts and raise points of law. It is through pleading that parties communicate the case they wish to advance. Good pleadings call for precision to identify the material facts supporting each allegation.
20. The primary function of a pleading is to tell the defending party what claim it has to meet and inform the court, of facts and issues before it for determination. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action or a defense. Therefore, each party to a suit must state their claims or defense so that each party knows what is at stake to prepare for the trial.
21. In *Dakianga Distributors (K) Ltd vs. Kenya Seed Co. Ltd (2015) eKLR*, the court underscored the importance of pleadings as set in *Bullen and Leake and Jacobs "Precedent of Pleadings" 12<sup>th</sup> Edition* London, Sweet and Maxwell (The Common Law Library No. 5) where it stated; "The system pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases".
22. In this appeal, other than the preliminary objection dated 12.4.2022, the appellant did not file any pleadings, as known in law, to challenge the facts as pleaded in the plaint. The facts that there were pending or determined suits over the subject matter between the same parties or parties litigating under the same title were not pleaded by way of a statement of defense, set-off, or counterclaim.
23. In *Henry Wanyama Khaemba vs. Standard Chartered Bank Ltd & another (2014) eKLR*, the court said the issues of *res judicata*, duplicity of suits or suits having been spent, required probing of evidence.



The court said such issues could not be handled as preliminary objections due to the limited scope of jurisdiction on preliminary objection.

24. In *George Kamau Kimani and another vs. County Government of Trans Nzoia & another* (2014) eKLR, the court said one cannot raise res judicata by way of preliminary objection and that the best way to do so was by way of a notice of motion where pleadings are annexed to enable the court to determine whether the current suit was res-judicata. Like in the instant suit, Prof Sifuna, as he then was now a High Court judge had annexed a ruling regarding a case which had been struck out.
25. In *Quick Enterprises Ltd vs Kenya Railway Corporation Kisumu HCC No. 22 of 1999*, the court observed that when preliminary objections are raised, they should be capable of disposing of the matter, preliminarily without the court having to ascertain the facts from elsewhere apart from looking at the pleadings. In *United Insurance Co. Ltd vs. Scholastica A Odera Kisumu HCA No. 6 of 2005*, the court observed that a preliminary objection must be based on a point of law which is clear and beyond doubt and that a preliminary objection premised on facts that were disputed could not be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts were not disputed or contested.
26. In the lower court, the cause of action, as pleaded by the 2<sup>nd</sup> respondent, revolved around matrimonial property used as security for a loan without protection and nidification to her due to her overriding interest. For res-judicata to be invoked the element as set in *IEBC vs Maina Kiai & 4 others* (2017) eKLR and *John Florence Maritime* (supra) have to be met. The appellant had not availed a decision showing whether the suit property was matrimonial or not and whether the 2<sup>nd</sup> respondent was a party to the charge. The thread running through the suits may have been the suit property. However, res-judicata looks at the determination of the previous suit or issues to finality by a competent court, similar to the subsequent suit and between the same parties or parties litigating under the same umbrella.
27. The appellant merely raised a preliminary objection and relied on copies of pleadings filed in the previous suits. The said documents, which I believe are evidence, were not filed with a statement of defense in which the appellant had pleaded those facts. Rules of procedure and substantive law bind a court of law. It was not so difficult for the appellant to file a statement of defense and plead the issues of abuse of court process, res-sub judice, res-judicata and vexatious litigation.
28. I believe the preliminary objection as filed was not a pure point of law. It required some probing through evidence. The marking of previous suits as withdrawn did not amount to determining the issues to finality and on merits. I find the trial court was correct in dismissing the preliminary objection. Accordingly, this appeal must and is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13<sup>TH</sup> DAY OF DECEMBER 2023**

**In presence of**

C.A Kananu/Mukami

Alovi for appellants

**HON. CK NZILI**

**JUDGE**

