



**Saleh v Osano & another (Environment and Land Appeal  
E031 of 2023) [2025] KEELC 1030 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E031 OF 2023**

**SO OKONG'O, J  
MARCH 3, 2025**

**BETWEEN**

**ZUHURA ANUBII SALEH ..... APPELLANT**

**AND**

**MAURICE KAJINA OSANO ..... 1<sup>ST</sup> RESPONDENT**

**PHILIP ONYANGO OTETE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. E.N. Mwenda PM delivered  
on 2nd November 2023 in Kisumu CMC ELC No. E142 of 2023)*

**JUDGMENT**

1. This appeal is challenging the ruling delivered by Hon. E.N. Mwenda PM on 2<sup>nd</sup> November 2023 in Kisumu CMC ELC No. E142 of 2023 (hereinafter referred to as “the lower court suit”). The Appellant filed the lower court suit against the Respondents through a plaint dated 19<sup>th</sup> October 2023. The Appellant averred that on 13<sup>th</sup> October 2023, she received a notice from the 2<sup>nd</sup> Respondent to vacate the parcel of land known as Kisumu/Kasule/3655 (hereinafter referred to as “the suit property”). The Appellant averred that she called the 2<sup>nd</sup> Respondent’s advocate who informed her that the suit property had been sold to the 2<sup>nd</sup> Respondent. The Appellant averred that the suit property was her matrimonial home together with the 1<sup>st</sup> Respondent.
2. The Appellant averred that the 1<sup>st</sup> Respondent could not sell the suit property without her consent as the 1<sup>st</sup> Respondent’s spouse and therefore the purported sale was illegal. The Appellant sought a declaration that the sale of the suit property by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent without the consent of the Appellant was null and void and a permanent injunction prohibiting the Respondents from engaging in the sale of the suit property without the consent of the Appellant.



3. I have not seen on record a defence if any that was filed by the Respondents in the lower court. From the record, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated 26<sup>th</sup> October 2023 against the lower court suit. The 1<sup>st</sup> Respondent contended that the Appellant's cause of action in the lower court related to a dispute over matrimonial property which included the suit property. The 1<sup>st</sup> Respondent contended that a suit with a similar cause of action had been filed against him by the Appellant in the High Court at Kisumu namely, Matrimonial Cause (O.S) No. E005 of 2023 which was pending determination. The 1<sup>st</sup> Respondent contended that the lower court suit was filed contrary to the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. The 1<sup>st</sup> Respondent contended that the lower court lacked jurisdiction to handle the Appellant's suit since the suit was sub-judice and prayed that the suit be struck out.
4. When the 1<sup>st</sup> Respondent's preliminary objection came up for hearing in the lower court, the 1<sup>st</sup> Respondent submitted that the Appellant's suit was brought in respect of the issues that were pending determination in another suit between the same parties over the same subject matter. The 1<sup>st</sup> Respondent submitted that the suit offended Section 6 of the *Civil Procedure Act* which prohibited the court from proceeding with the trial of any suit or proceedings between the same parties or between parties under whom any of them claim litigating under the same title where such suit or proceedings is pending in the same or any court having jurisdiction in Kenya to grant the relief claimed. The 1<sup>st</sup> Respondent submitted that the issues raised by the Appellant in the lower court suit and the reliefs sought were similar to the issues raised and reliefs sought by the Appellant in Kisumu High Court Matrimonial Cause (O.S) No. E005 of 2023 between the Appellant and the 1<sup>st</sup> Respondent which was pending determination. The 1<sup>st</sup> Respondent submitted that the lower court could not entertain the Appellant's claim as it raised issues which were pending determination before the High Court and there was a possibility of conflicting orders being made by the two courts. The 1<sup>st</sup> Respondent faulted the Appellant for not disclosing to the lower court the existence of the High Court suit.
5. In her submission in reply, the Appellant submitted that the issues raised by the 1<sup>st</sup> Respondent in his Notice of Preliminary Objection did not consist of pure points of law that were pleaded and were wrongly raised by way of a preliminary objection. The Appellant admitted that there was a suit pending in the High Court at Kisumu between the Appellant and the 1<sup>st</sup> Respondent. The Appellant submitted however that the causes of action in the two suits were different. The Appellant submitted that in the suit before the lower court, she was challenging a notice of eviction issued by the 2<sup>nd</sup> Respondent who was not a party to the High Court suit and who could not be joined in the suit. The Appellant urged the court to dismiss the preliminary objection.
6. In its ruling dated 2<sup>nd</sup> November 2023, the lower court found that the issues raised by the Appellant in the lower court suit were substantially in issue before the High Court and since the lower court suit was filed later in time, the same was sub-judice the matter pending in the High Court. The lower court was of the view that the lower court suit reeked of forum shopping since the High Court was capable of dealing with what the Appellant had claimed to be a new cause of action. The lower court stated that the Appellant should have sought protection from High Court. The lower court struck out the entire suit as being an abuse of the court process and awarded costs to the 1<sup>st</sup> Respondent on the higher scale.
7. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In her Memorandum of Appeal dated 2<sup>nd</sup> October 2023, the Appellant challenged the lower court's ruling on the following grounds;
  1. That the learned Magistrate erred in law and fact by sustaining a preliminary objection not based on pure point of law and on pleadings on record.



2. That the learned Magistrate erred in fact and law in concluding that there was another suit in the High Court while the pleadings in the suit were not before it and the nature of the dispute in the suit and its similarity with the lower court suit were contested.
  3. That the learned Magistrate erred by failing to interpret the law of sub-judice and preliminary objection properly thereby dismissing the claim with costs.
  4. That the learned Magistrate erred in fact and law by dismissing the claim with costs at a higher scale while the Respondent had neither entered appearance nor filed a defense.
  5. That the learned Magistrate erred in fact and law by ignoring evidence available and considering evidence not placed before it in a preliminary objection.
18. The Appellant prayed that the appeal be allowed and the lower court suit be reinstated for hearing and determination on merit. The Appellant also prayed for the costs of the appeal.
  19. The court directed that the appeal be heard by way of written submissions. The Appellant filed submissions dated 3<sup>rd</sup> December 2024 while the Respondents did not file submissions. The Appellant submitted that the doctrine of res sub-judice as captured under Section 6 of the *Civil Procedure Act* bars a court from proceeding with a trial of any suit in which the matter in issue is directly and substantially in issue in an earlier suit pending in the same or any other court. The Appellant submitted that Kisumu High Court Matrimonial Cause (O.S) No. E005 of 2023 involved matrimonial property issues while the lower court suit concerned an alleged irregular sale of the suit property and threatened eviction. The Appellant submitted that the parties and issues raised in the two cases were not identical or directly analogous, contrary to the requirements of the res sub-judice doctrine. In support of this submission, the Appellant cited Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others [2017] eKLR.
  20. The Appellant submitted further that a preliminary objection is a procedure that serves to dispose of matters purely on the law without delving into factual details. The Appellant submitted that the lower court allowed the 1<sup>st</sup> Respondent's preliminary objection without appreciating that it was supported by evidence contrary to the established legal principles. The Appellant submitted that preliminary objections contingent on facts or circumstances not evident in the pleadings cannot stand as valid preliminary objections. In support of this submission, the Appellant cited Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. [1969] E.A 696.

### **Analysis and Determination**

21. I have considered the pleadings and the proceedings of the lower court, the ruling of the lower court the subject of this appeal and the grounds of appeal put forward against the same by the Appellant. I have also considered the submissions by the advocates for the Appellant. I am of the view that the only issue arising for determination in this appeal is whether the lower court was right in allowing the 1<sup>st</sup> Respondent's preliminary objection and dismissing the Appellant's suit with costs on a higher scale.
22. In Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696. '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



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 has to be ascertained or if what is sought is exercise of judicial discretion.”

23. In *Oraro v. Mbaja*[2005]1KLR141, the court stated that:

A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

24. I agree with the Appellant that the 1<sup>st</sup> Respondent’s preliminary objection was wrongly taken. From the record of the lower court, at the time the preliminary objection was raised, the Respondents had not filed their defences to the Appellant’s claim. This means that the 1<sup>st</sup> Respondent’s preliminary objection was not based on any pleading. A preliminary objection must be based on a pure point of law that has been pleaded or which arises by implication from the pleadings. The point of law that was raised by the 1<sup>st</sup> Respondent in his preliminary objection was not pleaded neither did it arise by implication from the pleadings. The lower court should have rejected the 1<sup>st</sup> Respondent’s preliminary objection on this ground.

25. I am also of the view that after coming to the conclusion that the issues raised by the Appellant before the High Court and the lower court were similar, the lower court should have stayed the lower court suit pending the determination of the High Court suit. It was not necessary to strike out the suit before the High Court suit was determined. The need to stay a suit which is actually provided for in Section 6 of the *Civil Procedure Act* rather than striking it out or dismissing it if it is considered sub-judice can be seen in the final judgment of the High Court made on 5<sup>th</sup> December 2024 in Matrimonial Cause (O.S) No. E005 of 2023 on which the 1<sup>st</sup> Respondent’s Preliminary Objection was based. In that judgment, the High Court did not deal with the issues that the Appellant had raised in the lower court suit against the Respondents. The court in the matter blamed poor pleadings for tying its hands and suggested that further proceedings would be necessary to determine some of the issues the court could not deal with. If the lower court suit had been stayed, nothing would have prevented the Appellant from proceeding with the suit since the issues raised in the suit were not dealt with by the High Court.

26. I also fault the lower court for dismissing the entire suit while the preliminary objection was raised only by the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent did not raise a preliminary objection neither did he ask the court to dismiss the suit against him. Finally, I agree with the Appellant that the lower court erred in condemning her to pay costs on a higher scale. From the proceedings, this court appreciates the lower court’s displeasure with the Appellant’s conduct of failing to disclose that she had instituted parallel proceedings in the High Court. This could however not justify the making of an improper order. Party and Party Costs in the Subordinate Court is provided for in Schedule VII of the Advocates Remuneration Order which provides as follows on Lower and Higher scale costs: “Note:—The “Lower Scale” shall be applied in all cases where no defence or other denial of liability has been filed and the “Higher Scale” shall be applied in all other cases.” Since the Respondents had not filed their defences in the lower court at the time the preliminary objection was raised and determined, they were not entitled to costs on the Higher Scale.



## **Conclusion**

27. For the foregoing reasons, I find merit in the Appellant's appeal. The ruling of the lower court delivered on 2<sup>nd</sup> November 2023 is set aside in its entirety and substituted with an order dismissing the 1<sup>st</sup> Respondent's preliminary objection in the lower court dated 26<sup>th</sup> October 2023. The lower court suit is reinstated for hearing on merit before a different magistrate. Each Party shall bear its costs of the preliminary objection in the lower court and of the appeal.

**DELIVERED AND DATED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF MARCH 2025**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Otieno Obiero for the Appellant

N/A for the Respondents

Ms. J. Omondi-Court Assistant

