



REPUBLIC OF KENYA



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

**Waithaka & 2 others v Family Bank Limited & 2 others (Environment and Land Appeal E022 of 2021) [2024] KEELC 4110 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4110 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E022 OF 2021**

**JO OLOLA, J**

**MAY 9, 2024**

**BETWEEN**

**ANN WACHUKA WAITHAKA ..... 1<sup>ST</sup> APPELLANT**

**MARGARET WAITHAKA ..... 2<sup>ND</sup> APPELLANT**

**PETER GACHARI ISAAC ..... 3<sup>RD</sup> APPELLANT**

**AND**

**FAMILY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PURITY WAKIURU WAITHAKA ..... 2<sup>ND</sup> RESPONDENT**

**LEAKEY AUCTIONEERS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This is an Appeal arising from the Ruling of the Hon. A. Mwangi, Principal Magistrate as delivered on 24<sup>th</sup> June, 2021 in Karatina SPM ELC case No. 3 of 2021.
2. By a Complaint dated 8<sup>th</sup> February 2021, Ann Wachuka Waithaka, Margaret Waithaka and Peter Gachari Isaac (the Appellants herein) had sought for Judgment against the Respondents for:
  1. A declaration that the suit land, Magutu/Ragati/11 was fraudulently charged in favour of the 1<sup>st</sup> Defendant;
  2. A declaration that the charge placed on the suit land Magutu/Ragati/11 in favour of the Defendant was null and void ab initio;
  3. An order to the Registrar of Lands Nyeri to discharge the suit land Magutu/Ragati/11 as the charge is illegal and fraudulent;
  4. General damages; and



5. Costs of the suit and interest at such rates and for such periods as the Court may deem fit.
3. In addition to their suit, the Appellants contemporaneously filed a Notice of Motion Application also dated 8<sup>th</sup> February, 2021 urging the Court to issue a temporary order of injunction to restrain the 1<sup>st</sup> Respondent from entering, occupying, leasing, transferring, charging or selling or in any manner whatsoever dealing with the suit property pending the hearing and determination of the suit.
4. In response to the suit, Messrs Family Bank Limited (the 1<sup>st</sup> Respondent herein) filed its own Notice of Motion Application dated 23<sup>rd</sup> February, 2021 wherein it sought an order that the Plaint dated 8<sup>th</sup> February, 2021 and filed in Court on 9<sup>th</sup> February, 2021 be struck out with costs for being sub-judice Milimani Commercial Law Courts Civil Case No. 11002 of 2018.
5. Having heard the two Applications and in her Ruling dated 24<sup>th</sup> June, 2021 aforesaid, the learned Trial Magistrate allowed the 1<sup>st</sup> Respondent's Application and proceeded to strike out the suit as filed by the Appellants.
6. Aggrieved by the said determination, the Appellants moved to this Court and lodged the Memorandum of Appeal herein dated 28<sup>th</sup> June, 2021 urging this court to set aside the entire Ruling on the grounds;
  1. That the Learned Magistrate erred in law and in fact in finding that Karatina ELC Case No. 3 of 2021 was sub-judice to Milimani Case Number 11002 of 2018;
  2. That the Learned Magistrate erred in law and in fact in finding that the Karatina ELC Case No. 3 was sub-judice even when the critical elements of sub-judice were not proved;
  3. That the Learned Magistrate erred in law and in fact in finding that Karatina ELC No. 3 was sub-judice even when she did not properly address the question whether the Appellants herein were proper Parties in the Milimani Case No. 11002 of 2018;
  4. That the Learned Magistrate erred in law and in fact in finding that the issues before Milimani Case No. 11002 of 2018 and Karatina ELC Case No. 3 of 2021 were similar;
  5. That the Magistrate erred in law and in fact by compounding all issues in both cases into one broad issue when each should have been considered differently;
  6. That the Magistrate erred in law and in fact in failing to address the question if the Plaintiffs were Parties (*sic*) in the Milimani Case 11002 of 2018 for lack of jurisdiction to do so when it was a critical question;
  7. That the Magistrate erred in law and in fact by the simplistic compounding of Parties into the property owners vs chargor instead of considering the Parties individually;
  8. That the Magistrate erred in law and in fact by rendering the Ruling that is manifestly unjust and has the effect of depriving the Appellants of the land; and
  9. That the Magistrate erred in law and in fact by failing to consider the Appellant's application for injunction citing lack of jurisdiction.
7. As it were, a first appeal is by way of a retrial and this Court therefore has a duty to re-evaluate, re-analyse and reconsider the evidence presented before the trial Court and to draw its own conclusions [*Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR].



8. Accordingly I have carefully perused and considered the Record of Appeal as well as the Ruling delivered by the Learned Trial Magistrate. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
9. By their suit as instituted in the Lower Court on 9<sup>th</sup> February 2021, the three (3) Appellants herein had sought a declaration that the parcel of land known as Magutu/Ragati/11 (the suit property) was fraudulently charged in favour of the 1<sup>st</sup> Respondent. Accordingly they sought a declaration that the charge placed over the suit property was null and void and urged the Court to direct the Land Registrar Nyeri to proceed and discharge the same.
10. In addition to the suit, the Appellants simultaneously filed a Notice of Motion Application dated 8<sup>th</sup> February, 2021 by which they sought to restrain the 1<sup>st</sup> and 3<sup>rd</sup> Respondents herein from proceeding with a scheduled public auction of the suit property which was due for 16<sup>th</sup> February, 2021 and from any dealing with the property pending the hearing and determination of their suit.
11. In response to the suit and the Application the 1<sup>st</sup> Respondent filed its own Notice of Motion Application dated 23<sup>rd</sup> February, 2021 wherein it sought that the Appellant's suit be struck out with costs for being sub-judice Nairobi Milimani Commercial Court Civil Case No. 11002 of 2018. The trial Court agreed with the 1<sup>st</sup> Respondent that the Appellants' suit was sub-judice and proceeded to strike out the suit and thereby provoked this Appeal.
12. The doctrine of sub-judice is captured at Section 6 of the [Civil Procedure Act](#) as follows:

“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. In support of their contention that the Appellants' suit was sub-judice, the 1<sup>st</sup> Respondent asserted that the Appellants had previously filed the said Nairobi Milimani Commercial Court Civil Case No. 11002 of 2018 over the same subject matter and that by a Ruling delivered therein on 26<sup>th</sup> November 2020, the Appellants' Application for interim injunction was dismissed with costs. It was therefore the 1<sup>st</sup> Respondent's case that the new suit filed before the Karatina Senior Principal Magistrate's Court was filed in abuse of the Court process as the Appellants had obtained orders through material non-disclosure of the relevant facts to the Court.
14. As it turned out, the Appellants did not respond to the averments contained in the Supporting Affidavit of Sylvia Wambani as sworn in support of the 1<sup>st</sup> Respondent's Application dated 23<sup>rd</sup> February, 2021. At Paragraphs 8 to 13 of the Affidavit of the 1<sup>st</sup> Respondent's Legal Officer, she deposes as follows:
  - “ 8. That in an effort to realise the security and recover its money, the 1<sup>st</sup> Defendant proceeded to exercise its statutory power of sale and duly issued all statutory notices via registered post to their last known address (Annexed hereto and marked SW-3 are copies of Certificates of Postage);
  9. That in a bid to stop the 1<sup>st</sup> Defendant from exercising its right to realise the security, the Plaintiffs together with the 2<sup>nd</sup> Defendant moved to Court in Milimani Commercial Law Courts Civil Case No. 11002 of 2018 filed together with a Notice of Motion Application under Certificate of Urgency



seeking orders to stop the 1<sup>st</sup> Defendant from realising its security (Annexed hereto marked SW-4 (a) and (b) once copies of the said Application and Plaint dated 11<sup>th</sup> December, 2018);

10. That in the above suit before the Court at Milimani, the Plaintiffs never raised the issues they are raising in this suit. Instead, their main borne of contention was that they were not supplied with statements of account, that their properties are dwelling houses and that they were not served with Statutory Notice;
  11. That after considering the issues raised in the suit the Court delivered a Ruling on the Application dated 11<sup>th</sup> December, 2018 on 26<sup>th</sup> November 2020, in favour of the 1<sup>st</sup> Defendant dismissing the said Application. The Court found that due process was properly followed by the 1<sup>st</sup> Defendant. Consequently, the 1<sup>st</sup> Defendant was allowed to proceed with its statutory power of sale as the loan was in serious arrears and continued to accrue interest (Annexed hereto and marked SW-5 is a copy of the Ruling);
  12. That subsequent to the Ruling delivered, the Plaintiff further filed an Application under Certificate of Urgency dated 29<sup>th</sup> January, 2021 seeking stay of execution of the said Court order as the 1<sup>st</sup> Defendant had already advertised the suit property in the dailies for purposes of sale through a public auction that was to be held on 16<sup>th</sup> February, 2021. (Annexed hereto and marked SW-6 is a copy of the Application); and
  13. That further to the foregoing, the Plaintiff proceeded to Karatina Law Courts and filed this instant suit and Application before this Honourable Court for determination in a bid to deceive and lure the Court into granting interim orders restraining the 1<sup>st</sup> Defendant from carrying out the aforementioned public auction thereby depriving the 1<sup>st</sup> Defendant of the right to exercise its right to realise its security.”
15. From a perusal of the above averments, it was apparent that the 1<sup>st</sup> Respondent was asserting that it is the same Appellants herein who had instituted the previous suit and having failed to obtain the orders they desired, they moved to the Karatina Magistrates Court and filed a separate suit from which they obtained interim orders of injunction stopping the scheduled sale of the suit property by public auction.
  16. It was interesting to note that the Appellants chose not to respond to those accusations. Instead in their submissions before the Court, they appeared to argue that the fact that their names appeared in the pleadings did not mean that they were proper parties to the suit.
  17. That argument was rather too late and completely misplaced. From a perusal of the Plaint as filed in the Chief Magistrates Court at Nairobi (Page 115 of the Record), it was apparent that the Milimani case was instituted by the 2<sup>nd</sup> Respondent herein as the 1<sup>st</sup> Plaintiff together with the three (3) Appellants herein plus three (3) other siblings as the Plaintiffs. The 1<sup>st</sup> Respondent herein was sued as the sole Defendant.
  18. It was also apparent from a further perusal of the said Plaint that the Plaintiffs therein had sought to restrain the 1<sup>st</sup> Respondent herein from disposing off the suit property and another parcel of land by way of a public auction on account that the 1<sup>st</sup> Respondent had levied illegal interest on the amount



of money loaned to a company known as Jamput Agencies Limited and that the 1<sup>st</sup> Respondent had failed to serve them with the requisite notices.

19. As the Supreme Court of Kenya stated in *Kenya National Commission of Human Rights -v Attorney General & 17 Others* (2020) eKLR:

“The term “sub-judice” is defined in *Black’s Law Dictionary* 9<sup>th</sup> Edition as

“Before the Court or Judge for determination.”

The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same Parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same Parties on the same subject matter before the Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.”

20. In the matter before me, there was no dispute that the main suit filed at the Milimani Commercial Court remains pending for hearing and determination. It was rather evident from the circumstances depicted hereinabove that the subsequent suit filed before the Karatina Magistrates Court was solely aimed at forestalling the scheduled public auction of the suit property after the Appellant’s Application for injunction was dismissed in the Nairobi suit.
21. It follows that I am persuaded that the suit filed in the Lower Court was not only sub-judice but filed in abuse of the process of this Court. This Appeal is therefore without merit and must fail. It is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

In the presence of:-

Ms Mumbi holding brief for Omiti for the 1<sup>st</sup> Respondent

No appearance for the Appellant

Court assistant – Kendi

.....

**J. O. OLOLA**

**JUDGE**

