



M’Thiringi v Mwari t/a Marflo Implex & another; District Land Registrar, Ruiru (Interested Party) (Environment and Land Appeal E014 of 2023) [2024] KEELC 7511 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E014 OF 2023
BM EBOSO, J
NOVEMBER 6, 2024**

BETWEEN

MARK GITONGA M’THIRINGI APPELLANT

AND

FLORA MWARI T/A MARFLO IMPLEX 1ST RESPONDENT

PRISCA NZULA WAMBUA 2ND RESPONDENT

AND

DISTRICT LAND REGISTRAR, RUIRU INTERESTED PARTY

(Being an Appeal against the Ruling of Hon J A Agonda, Principal Magistrate, delivered on 30/1/2023 in Ruiru Senior Principal Magistrate Court MCL & E Case No E198 of 2022)

JUDGMENT

Introduction

1. This appeal challenges the ruling rendered by Hon J A Agonda (PM) on 30/1/2023 in Ruiru MCL & E Case No. E198 of 2022. The key issue that fell for determination in the impugned ruling was whether the said suit was subjudice. Mark Gitonga M’thiringi, the appellant in this appeal, was the plaintiff in the lower court. Flora Mwari t/a Marflo Implex, the 1st respondent in this appeal, was the 1st defendant. Prisca Nzula Wambua, the 2nd respondent in this appeal, was the 2nd defendant. The District Land Registrar - Ruiru, the interested party in this appeal, was the interested party in the lower court. The two key issues that fall for determination in the appeal are: (i) Whether a preliminary objection was available to the 2nd respondent as a platform on which to ventilate the issue of subjudice; and (ii) Whether Ruiru SPMC E & L Case No E198 of 2022 violated the doctrine of subjudice. Before



I analyse and dispose the key issues, I will outline a brief background to the appeal and the parties' respective submissions in the appeal.

Background

2. The suit in the lower court was initiated by the appellant through a plaint dated 18/11/2022. He sought the following reliefs against the respondents: (i) a permanent injunction restraining the 1st respondent against trespassing on, encroaching on, selling, disposing, charging and or interfering with properties that he described as Ruiru East/Juja East Block 2/21579 Plot Number 20 and Ruiru East / Juja East Block 2/21579 Plot Number 37 [the suit properties]; (ii) an order directing the interested party to remove the caution placed by the 2nd respondent against the suit properties; (iii) an order directing the interested party to cancel the subsisting titles and issue fresh titles in favour of the appellant in respect of the suit properties; (iv) damages for trespass; (v) compensation for extraction of quarry stones from the suit properties; (vi) mesne profits; (vii) costs and interest with effect from the date of filing the suit until payment in full.
3. The appellant also filed a notice of motion application dated 18/11/2022 seeking interlocutory injunctive orders. The court scheduled the suit for mention on 7/12/2022 during which it issued a status quo order and directed that there were to be no dealings in the suit properties, pending disposal of the application dated 18/11/2022.
4. The 1st respondent filed a notice of appointment dated 19/12/22. The 2nd respondent filed a memorandum of appearance dated 1/12/2022 and subsequently filed a notice of preliminary objection on 4/1/2023 challenging the suit on the ground that it offended the provisions of Section 6 of the [Civil Procedure Act](#).
5. On 20/12/22, parties were given directions on filing submissions on the notice of preliminary objection. Upon receipt and consideration of the parties' submissions, the lower court rendered the impugned ruling in which it found that the suit was filed in violation of the provisions of Section 6 of the [Civil Procedure Act](#). The lower court allowed the preliminary objection and dismissed the suit together with the appellant's notice of motion dated 18/11/2022. The court also vacated the interim orders it had issued on 7/12/2022.

Appeal

6. Aggrieved by the ruling of the lower court, the appellant brought this appeal, advancing the following fourteen (14) verbatim grounds:
 1. The learned magistrate erred in law and fact in finding that the preliminary objection dated 3/1/2023 was meritorious and striking out the appellant's suit.
 2. The learned magistrate erred in law and fact by misapprehending and wrongly applying the provisions of Section 6 of the [Civil Procedure Act](#) on stay of suit which provides 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 is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. The trial court wrongly treated the suit as res judicata yet no findings had been made by any court.
 3. The learned magistrate erred in law and fact in failing to find that the 2nd respondent had not produced before the court any document pertaining to the mentioned case because a miscellaneous application is not a substantive suit upon which substantive reliefs can be sought and granted by court.



4. The learned magistrate erred in law and fact in failing to find neither party was a substantive party in any suit because CMCC Misc No. 6916 of 2018 (Milimani) is not a substantive suit yet the court erroneously treated it as a substantive suit. The appellant's suit was substantively anchored on the plaint unlike the aforesaid miscellaneous application.
 5. The learned magistrate erred in law and fact in failing to exercise her jurisdiction and discretion in granting the impugned decision dated 30/1/2023 with the effect of condemning the appellant unheard on merits contrary to the law and principles of justice.
 6. The learned magistrate erred in law and misdirected herself in failing to find that a preliminary objection must be purely on points of law. The principles set out in the case of *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Limited* [1966] EA 696 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..."
 7. The learned magistrate erred in law and fact by failing to find that the appellant had not offended the provisions of Section 6 of the *Civil Procedure Act* as claimed because the cause of action and the parties in both suits are not the same and the cause of action had arisen way after the alleged matter had been filed. The applicant was not a substantive party but merely an interested party in Miscellaneous Application Number No. 6916 of 2018 (Milimani). The Preliminary Objection dated 3/1/2023 was misconceived and lacked merits.
 8. The learned magistrate erred in law and fact by failing to find that the Appellant was not seeking 5 million from the 2nd respondent but his claim was substantially against the 1st defendant over compensation over a cause of action that arose in 2022.
 9. The learned magistrate erred in law and fact that it is the appropriate court to hear and determine the suit because the suit premises fall under Ruiru Law Courts and not Milimani Magistrate's Courts.
 10. The learned magistrate erred in law and fact by failing to judiciously analyze and consider the affidavit evidence tendered before it by the appellant and submissions.
 11. The learned magistrate erred in law and fact in failing to consider the appellant's written and duly filed submissions, pleadings, evidence on record and list of documents presented in court.
 12. The learned magistrate erred in law and fact in rendering unlawful ruling that was not supported by pleadings, facts and evidence on record.
 13. The learned magistrate erred in law by failing to act judiciously based on the pleadings, facts and evidence on record.
 14. The learned magistrate erred in law by rendering unlawful ruling that contravenes the law by striking pleadings yet even if there are similar pending substantive matters, which the appellant denies, the appropriate orders would be to stay proceedings awaiting the outcome of any other matter over the same subject matter.
7. The appellant prayed for the following reliefs from this court: (i) an order setting aside the impugned ruling dated 30/1/2023 and all consequential orders; (ii) an order dismissing the 2nd respondent's notice of preliminary objection dated 3/1/2023 with costs to the appellant; (iii) an order directing the hearing of appellant's suit in the lower court; and (iv) order condemning the respondent to bear costs of this appeal.



Appellant's Submissions

8. The appeal was canvassed through written submissions dated 2/2/2024, filed by M/s Kurauka & Company Advocates. Counsel for the appellant contended that the preliminary objection ought to have been dismissed because it was founded on facts and not purely on points of law. Counsel relied on the decision in the case of Mukisa Biscuits Manufacturing Co Limited vs West End Distributors Limited [1966] EA and Oraro vs Mbajja [2005] eKLR.
9. Counsel submitted that the 2nd respondent did not demonstrate that there were other cases in which the matter in issue in the lower court were also directly and substantially in issue. Counsel further submitted that superior courts have laid down principles on subjudice which lower courts are bound to follow. Counsel relied on the decisions in the cases of Kenya National Commission on Human Rights vs Attorney General; IEBC & 16 Others (Interested Parties) [2020]eKLR, Mukunya Mugo 'A' & Another vs Elizabeth Mugure Mukunya [2019] eKLR and Ali vs Ali (Environment & Land Case 58 of 2021)[2022] KEELC 3384 (KLR).
10. Counsel contended that the appellant was not a party in Milimani Chief Magistrate Court Case No. 6916 of 2018. Counsel argued that the appellant had neither abused the court process nor was he forum-shopping. Counsel added that the issues in Milimani Chief Magistrate Court Case No. 6916 of 2018 were not similar to the issues in Ruiru MCELC NO. E198 of 2022. Counsel relied on the decision in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR where the court elaborated on the issue of "abuse of court process".
11. In conclusion, counsel submitted that the appellant's suit did not offend the provisions of Section 6 of the *Civil Procedure Act*. Counsel urged the Court to allow the appeal, dismiss the preliminary objection dated 3/1/2023, and order that the suit in the lower court does proceed for hearing on priority basis before any other magistrate at Ruiru Law Courts. Counsel further urged the Court to award the appellant costs of the preliminary objection.

1st Respondent's Submissions

12. The 1st respondent opposed the appeal through written submissions dated 28/5/2024, filed by Muma & Kanjama Advocates. Counsel for the 1st respondent identified the following as the five issues that fell for determination in the appeal: (i) Whether the learned magistrate was correct in finding that the appellant's suit commenced vide a plaint dated 18/11/2022 was sub-judice; (ii) Whether the learned magistrate applied the law correctly and properly in holding that the notice of preliminary objection dated 3/1/2023 was meritorious; (iii) Whether the learned magistrate was correct in finding that the court lacked the jurisdiction to hear and determine the notice of motion and the plaint dated 18/11/2022; (iv) Whether the learned magistrate duly considered the evidence, affidavits and submissions tendered by the appellant and arrived at a judicious decision; and (v) Whether the learned magistrate arrived at a correct decision and rendered a proper ruling.
13. On whether the learned magistrate was correct in finding that the appellant's suit which was commenced vide a plaint dated 18/11/2022 was sub judice, counsel submitted that the two pending consolidated suits filed at the Milimani Chief Magistrate Court, namely, Milimani CMCC No. 6916 of 2018 and Milimani CMCC No. 1159 of 2020 involved, among others, land parcel numbers, Ruiru East/Juja East Block 2/21579 Plot No. 20 and Ruiru East/Juja East Block 2/21579 Plot No. 37, which were the subject matter of the suit in the lower court. Counsel further submitted that because of this, there was more than one suit pending before courts of competent jurisdiction over the same subject matter. Counsel contended that the suits at the Milimani Chief Magistrate Court were filed first in time. Counsel further contended that the appellant acceded to the jurisdiction of the court in Milimani



CMCC No. 1159 of 2020 when he applied to be joined as an interested party in the proceedings through the notice of motion dated 13/7/2018. Counsel faulted the appellant for misrepresenting to the court under grounds 4 and 7 of his memorandum of appeal that Milimani CMCC No. 1159 of 2020 was not a substantive suit but merely a miscellaneous application. Counsel contended that the said suit was commenced by way of an originating summons pursuant to Order 37 rule 11 of the Civil Procedure Rules. Counsel further contended that initiating a suit by way of originating summons does not make the suit a miscellaneous application.

14. Counsel submitted that the parties in the consolidated suits filed at the Milimani Chief Magistrate Court were substantially similar to the parties in the suit filed at the lower court. Counsel further submitted that the only minor difference between the two suits was that whereas the Thika Land Registrar was sued as the 2nd defendant in Milimani CMCC No.1159 of 2020, the Ruiru District Land Registrar was sued as an interested party in the suit at the lower court. Counsel argued that the appellant having been joined to the proceedings in Milimani CMCC No 1159 of 2020 as an interested party, he had the liberty to participate in the proceedings to protect any interest or legal stake he had. Counsel further argued that instituting separate proceedings at the lower court while being a party to the consolidated suits at the Milimani Chief Magistrate Court amounted to forum-shopping by the appellant. Counsel added that the learned magistrate correctly made a finding that the suit before it was subjudice.
15. On whether the learned magistrate applied the law correctly and properly when she held that the notice of preliminary objection dated 3/1/2023 was meritorious, counsel submitted that the notice of preliminary objection dated 3/1/2023 raised pure points of law. Counsel further submitted that greater harm would be occasioned if the court were to proceed to hear and determine the suit at the lower court despite there being two other pending consolidated suits at the Milimani Commercial Courts. Counsel added that such a scenario would result in conflicting decisions from the two courts over the same subject matter and would be a waste of judicial time and resources. Counsel relied on the decision in the case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors* [1969] EA.
16. On whether the learned magistrate was correct in finding that the court lacked the jurisdiction to entertain the notice of motion and the plaint dated 18/11/2022, counsel relied on the decision in the case of *Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited* [1989] eKLR in submitting that jurisdiction is everything and without it, a court of law should immediately down its tools. Counsel further submitted that a court may not arrogate to itself jurisdiction. Counsel contended that from the onset, it was the 2nd respondent's [sic] submission that the trial court lacked jurisdiction to hear and determine the appellant's notice of motion and plaint for want of jurisdiction. Counsel further contended that the lower court having found that it lacked jurisdiction to hear and determine the suit before it, properly struck out the appellant's suit. Counsel relied on the decision in the case of *Phoenix of E.A Assurance Company Limited vs S. M Thiga t/a Newspaper Service* [2019]eKLR where the court addressed the issue of jurisdiction. Counsel argued that the lower court lacked the jurisdiction to hear and determine a matter which was pending hearing and determination at the Milimani Chief Magistrates Court because the Chief Magistrate Court ranked higher in hierarchy and pecuniary jurisdiction compared to the Ruiru Senior Principal Magistrate Court.
17. On whether the learned magistrate duly considered the evidence, affidavits and submissions tendered by the appellant to arrive at a judicious decision, counsel submitted that all the parties were accorded a fair hearing. Counsel added that the lower court duly considered all the facts, the evidence, and the submissions tendered by the parties, and applied the law to the said facts.
18. On whether the learned magistrate arrived at a correct decision and rendered a proper ruling and whether the said ruling should be upheld, counsel submitted that this Court, as a first appellate court,



ought to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions. Counsel relied on the decisions in the cases of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR and *United India Insurance*.

Analysis and Determination

19. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. As observed in the introduction part of this Judgment, the two key issues that fall for determination in this appeal are: (i) Whether a preliminary objection was available to the 2nd respondent as a platform on which to ventilate the issue of subjudice; and (ii) Whether Ruiru SPMC E & L Case No E198 of 2022 violated the doctrine of subjudice. Before I analyse and dispose the two issues, I will outline the principle that guides this court when exercising appellate jurisdiction.
20. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
21. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
22. Was a preliminary objection the appropriate platform on which to ventilate the issue of subjudice? The 2nd respondent was the objector. Through her notice of preliminary objection dated 3/1/2023, she contended that the suit in the lower court offended the provisions of Section 6 of the [Civil Procedure Act](#). It was her case that there were two other preceding and subsisting suits relating to the same subject matter and involving the same issues and the same parties. Through the notice of preliminary objection, she identified the two suits as Milimani CMCC No 1159 of 2020 [formerly Milimani ELC Case No 425 of 2016] and Milimani CMCC No 6916 of 2018 [formerly Milimani HCCC No 556 of 2015].
23. The law on what can be properly ventilated on the platform of a preliminary objection is well-settled. In *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696, Sir Charles Newbold outlined the law as follows:

“So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection 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.”



24. In the same appeal, Law J A outlined the law as follows:
- “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 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”
25. The issue that the 2nd respondent raised as a preliminary objection was that of subjudice. In the context of court litigation, the doctrine of subjudice or res subjudice denotes the existence of a prior suit relating to the same subject matter and issues and involving the same parties. It is a common law doctrine that prohibits the filing and adjudication of a new suit in a scenario where there subsists a prior suit involving the same subject matter, the same issues and the same parties.
26. Kenya’s Parliament codified the doctrine of subjudice through the enactment of Section 6 of the *Civil Procedure Act*. The said Section provides 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. Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”
27. Under Section 107 of the *Evidence Act*, the party alleging subjudice is obligated to prove all the key elements of subjudice through evidence or by making reference to the pleadings of the offending party. This means that, where the elements of subjudice are not clear from the pleadings of the alleged offending party, the party alleging subjudice is expected to place before the court evidence relating to pleadings in the subsisting prior suit. It therefore follows that unless the alleged offending party has, as part of his own pleaded admissions or as part of his own evidence, placed before court all pleadings relating to the prior subsisting suit, the party alleging subjudice must bring a formal application supported with an appropriate affidavit bearing the relevant pleadings relating to the subsisting prior suit as annexures (exhibits).
28. I have looked at the original record of the lower court. I have also looked at the pleadings relating to the suit that was before the lower court. The elements of subjudice were not disclosed in the appellant’s pleadings. It is not clear how the pleadings relating to the other two subsisting prior suits were placed before the lower court to enable it interrogate them and establish existence of the key elements of subjudice. It is also not clear how the Learned Magistrate came to the conclusion that the key elements of subjudice had been established in the absence of pleadings relating to the two prior suits.
29. Given that the appellant’s pleadings did not establish the key elements of subjudice, the issue which the 2nd respondent raised as a preliminary objection was one that required a formal application and the requisite supporting evidence. A notice of preliminary objection was not available as an appropriate platform on which to ventilate the issue. That is the finding of the court on the first issue.
30. The second key issue in this appeal is whether the suit in the lower court violated the doctrine of subjudice. It is an issue that calls for a merit determination of the question as to whether the suit in the lower court was subjudice. Given the fact that the appellant’s pleadings did not disclose the key elements of subjudice, this issue is a factual phenomena which calls for proof through evidence. Having come to the conclusion that the preliminary objection was not an available platform for ventilating



the issue, and that the question of subjudice required proof through evidence, the court takes the view that this appeal should be disposed without venturing into merit pronouncements on the second issue. The appropriate disposal order would be to strike out the preliminary objection dated 3/1/2023 but leave the 2nd respondent with the liberty to ventilate the issue of subjudice on the platform of a formal application in the lower court. This court will, in the circumstances, refrain from making merit pronouncements on the second issue.

31. On costs, the errors leading to this appeal were committed by the lower court which inappropriately admitted a notice of preliminary objection as a platform on which to ventilate an issue that clearly required proof through evidence. For this reason, parties will bear their respective costs of this appeal.
32. In the end, this appeal is allowed in the following terms:
 - a. The ruling rendered on 30/1/2023 by Hon Agonda PM in Ruiru Senior Principal Magistrate Court E & L Case No E198 of 2023 is wholly set aside and is replaced with an order striking out the notice of preliminary objection dated 3/1/2023.
 - b. Costs of the said notice of preliminary objection shall be in the cause.
 - c. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF NOVEMBER 2024.

B M EBOSO

JUDGE

In the presence of:

Mr Kurauka for the Appellant

Ms Obure for the 1st Respondent

Court Assistant: Hinga

