



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kathumo v Nzuki & another (Environment and Land Appeal  
37 of 2021) [2023] KEELC 434 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 434 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 37 OF 2021  
A NYUKURI, J  
FEBRUARY 1, 2023**

**BETWEEN**

**MWANZIA KATHUMO ..... APPELLANT**

**AND**

**ANTHONY MWENDA NZUKI ..... 1<sup>ST</sup> RESPONDENT**

**DOMINIC SAMMY MUATHE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Hon. M. Opanga SRM, sitting at  
Kangundo Law Courts delivered on 27th July 2021, in ELC No. 171 of 2019)*

**JUDGMENT**

**Introduction**

1. The appellant in this appeal, being dissatisfied with the decision of Hon. M. Opanga, the Senior Resident Magistrate in Kangundo CMCC ELC No. 171 of 2019, which was delivered on 27<sup>th</sup> July 2021, striking out the said suit on account of section 7 of the Civil Procedure Act, appealed against the said ruling on the following grounds;
  - a. That the learned magistrate erred in law and misinterpreted this section 6 of the Civil Procedure Act and its effects.
  - b. That the learned magistrate erred in law and in fact when she considered the form of the suit to determine sub judice rather than its substance and looking at the pleadings in both cases.
  - c. That the learned magistrate erred and failed to find that section 6 of the Civil Procedure Act only provides for stay of suit and not striking of a suit
  - d. That the learned magistrate erred in law and in fact that the threshold for res-sub judice had not been met and that the two matters fell under different jurisdictions.



- e. That the learned magistrate erred when she relied on a ruling on a preliminary objection in a Succession Cause to make a draconian finding of striking out a suit, in a land court.
  - f. That the learned magistrate erred when she assisted and unilaterally replaced that the law relied on by the Respondent as section 7 and not section 6 of the Civil Procedure Act to the prejudice of the appellant and without opportunity of being heard.
2. Subsequently, the appellant sought that the ruling of the lower court made on July 27, 2021 be set aside and costs be awarded to him.

## **Background**

3. By a plaint dated November 26, 2019 the appellant sued the respondents alleging that land parcel No. 57 at Tala (suit property) belonged to the estate of Gedion Kathumo (deceased), and that the Respondents entered into land sale agreements with some of the beneficiaries to the estate of the deceased without permission from the administrator of the deceased's estate. He therefore sought for a declaration that the agreements dated 21<sup>st</sup> May, 2017 and July 2012 were illegal and null.
4. In response, the 1<sup>st</sup> respondent herein filed a statement of defence denying the claim in the plaint and alleging that he was the lawful and bonafide purchaser for value of the suit property having purchased the same from the administrators of the estate of the late Gideon Kathumo (deceased), and that that estate is the subject of Machakos High Court Succession Cause Nos 12 of 2006 and 13 of 2006 (consolidated) which cause was still pending. He further stated that he had lodged an objection in the said Succession Cause which objection proceedings were still pending hearing in court.
5. The 1<sup>st</sup> respondent therefore pleaded section 6 of the Civil Procedure Act and put the appellant on notice that he intended to raise a preliminary objection to the proceedings in the lower court on that basis.
6. In addition to the defence, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objection dated December 24, 2020 seeking to strike out the suit pursuant to section 6 of the Civil Procedure Act on the following grounds;
  - a. That the subject matter in the aforesaid suit (Plot No. 57 situated in Tala Market) and ownership thereof is directly and substantially in issue in Machakos High Court Succession Cause Nos. 12 of 2006 and 13 of 2006 (consolidated); to which both the plaintiff and the defendants herein are parties, and in which hearing is ongoing.
  - b. The suit herein is incompetent and an abuse of this court's process and cannot be entertained by this Honorable Court.
  - c. That the suit ought to be struck off with costs.
7. The Preliminary Objection was canvassed by way of written submissions. Upon considering the submissions for both parties, the trial court first began by stating that the preliminary objection ought to have been premised on section 7 and not section 6 of the Civil Procedure Act as quoted by the Respondents' counsel. The court then proceeded to state that it had perused the High Court Ruling dated May 20, 2020 and noted that the Plaintiff had filed a preliminary objection faulting the Jurisdiction of the High Court sitting as a Probate and Administration Court, to hear a claim for land based on a sale agreement. On that basis, the trial court found that the said preliminary objection was pending hearing and that therefore the High Court was not functus officio. The trial court further found that the issue before the High Court touched on the claim of land by the Defendant as against the plaintiffs, which was the same issue before her and that therefore as the same issue was still pending



hearing before the High Court, then the suit before her was res judicata. On that basis, the trial court proceeded to strike out the suit with costs to the respondent.

8. It is that decision to strike out the appellant's suit that provoked the current appeal.
9. The parties canvassed the appeal by way of written submissions. On record are the appellants' submissions filed on May 9, 2022 and the respondents' submissions filed on December 13, 2022.

### **Appellants Submissions**

10. Counsel for the appellant submitted that although the Preliminary Objection was based on section 6 of the *Civil Procedure Act*, the trial court found that the same ought to have been premised on section 7 of the Civil Procedure Act. Further that the trial court indeed spelt out the elements of the doctrine of *res judicata* as stated in section 7 aforesaid and proceeded to strike out the appellant's suit.
11. It was submitted for the appellant that for a party to rely on the doctrine of res judicata; they must demonstrate the following:
  - a. That the suit or issue raised was directly and substantially in issue in the former suit.
  - b. That the former suit was between the same parties or parties under whom they or any of them claim.
  - c. That those parties are litigating under the same title.
  - d. That the issue in question was heard and finally determined in the former suit.
  - e. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
12. Therefore, counsel argued that there is no former suit as the Succession Cause Nos 12 of 2006 and 13 of 2006 (consolidated) is still pending and that therefore the trial magistrate erred in framing an issue that was never raised by any party. Counsel pointed out that, that prejudiced the appellant who was not privy to or given opportunity to argue or challenge the new issue framed by the court.
13. On whether the respondents met the threshold for the doctrine of sub judice, counsel argued that the same doctrine is governed by section 6 of the *Civil Procedure Act* and that an applicant invoking the same doctrine must show that the matter in issue in the previously instituted suit is the same as in the subsequent suit; the proceedings must be between the same parties under whom they claim or any of them claim, litigating under the same title; and that such proceedings must be pending in the same court or in a court with jurisdiction to try the issues raised.
14. Reliance was placed on the cases of *Republic v Registrar of Societies Kenya & 2 others ex parte Moses Kirima & 2 others* [2017] eKLR and *Thika Min Hydro Co Ltd v Josphat Kan Ndiga* [2013] eKLR, for the proposition that where a similar suit is pending, the subsequent suit ought to be stayed until the earlier suit is heard and determined. Counsel pointed out that the explanatory notes to section 6 of the *Civil Procedure Act* only provides for stay of a similar suit and not the draconian act of dismissal or striking out of pleadings.

### **Respondents' Submissions**

15. Counsel for the respondents submitted that courts are not mere bystanders in the adversarial system and relied on the case of *Nyaga Cottolego Francis v Pius Mwaniki Karani* [2017] eKLR. Counsel argued that courts can frame and reframe issues where such reframing will serve the overriding



objective. Therefore, it was counsel's view that there was no fault in the learned magistrate's reframing of the issues before her.

16. While relying on the decision in the case of *Hassan Ali Jobo & another vs. Suleiman Said Shabal & 2 others SCK Petition 10 of 2013* [2014] eKLR, counsel submitted that a preliminary objection is not properly raised if the court is invited to look at contested facts appearing on the face of the pleadings. Counsel invited the court to consider paragraph 4 of the plaint, the Plaintiffs witness statements and the defence on record.
17. According to counsel, it is an uncontested fact that the subject matter of the suit formed part of the estate of the deceased person and secondly, that the same was directly and substantially in issue in Machakos High Court Succession Cause No 12 and 13 of 2006 (consolidated), which was pending determination. Reference was made to the case of *Salome Wambui Njau (suing as an Administrator of the Estate of Peter Kiguru Njuguna (deceased) v Caroline Wangui Kiguru* [2013] eKLR, for the proposition that where both the Land Court and the Probate Court have jurisdiction to determine a matter where the matter touches on the estate of the deceased, the Land Court ought to stay the suit before it and await the determination of the matter in the Probate and Administration Court.
18. It was counsel's view that both the Land Court and the High Court had concurrent jurisdiction to handle matters touching on land and succession. Further that nothing stops third parties from filing their claim in a Succession Cause. Counsel concluded that there was no error in the findings of the trial court and urged this court to uphold that decision.

### **Analysis and Determination**

19. Having carefully considered the appeal, submissions and the entire record, in my considered view, the issues that emerge for determination are as follows;
  - a. Whether the learned trial magistrate properly framed the issues before her.
  - b. Whether the order to strike out the appellants' suit was justified.
20. The duty of the first appellate court is to re-evaluate the record and determine whether the trial court was justified in arriving at the decisions it made, in the circumstances and it is for this court to make its own conclusions in view of the matters that were before the trial court for determination.
21. This appeal is rather straight forward as the issue raised before the trial court was a preliminary objection to the jurisdiction of the court. That objection was specifically anchored on section 6 of the *Civil Procedure Act* as can be seen from both the preliminary objection and paragraph 7 of the 1<sup>st</sup> respondent's statement of defence. Even the Respondents' submissions before the trial court was precisely based on section 6 of the *Civil Procedure Act*.
22. It was therefore without any basis or justification for the trial court having stated in the introduction of its ruling that the objection was based on section 6 of the *Civil Procedure Act*, to hasten to add that "in essence the provision is section 7 and not 6 as quoted by the defendants' advocate". I have considered the entire ruling and I have not found anywhere where the trial court expressly or by implication gave any justification or basis or that shift.
23. While it may appear desirable to the trial court to follow a particular trajectory that the court believes the case should take, where parties have not raised an issue, and where an issue cannot be conceived from the pleadings or evidence, the court ought not in its decision introduce a new issue and proceed to make a finding on the same. Issues ought to stem from what is filed on record.



24. If the court is of the view that the pleadings and documents on record raise issues that the parties have not referred to or paid attention to, then nothing stops the court from bringing such issues to the attention of the parties, framing the question in issue and granting the parties an opportunity to address the issue before the court makes a finding on the same. It is against the spirit of article 50 of the Constitution which enshrines the non derogable right to be heard, for the court on its own motion and in the absent of both parties, to frame a different issue from the one addressed by the parties and to proceed to pronounce itself on the same. That would be an injustice, as the parties would not have had opportunity to be heard on such issue.
25. In the instant suit, the appellant has rightly pointed out that he had no chance to challenge the issue of res judicata which is a doctrine premised on section 7 of the Civil Procedure Act. It is therefore my finding that the learned trial magistrate erred in law in abandoning the question of sub judice that was placed before her and framing a new question of *res judicata* which none of the parties had addressed in their pleadings and submissions before her.
26. I will hasten to add that the question of res judicata as governed by section 7 of the Civil Procedure Act, did not arise before the trial court either from the pleadings or by the parties' submissions.
27. Having considered the issue raised in the preliminary objection and the submissions, the question that this court ought to address is whether the Respondent satisfied the elements of sub judice as set out in section 6 of the Civil Procedure Act. That 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.
28. Essentially, section 6 of the Civil Procedure Act stops the court from proceeding with the trial of a suit where the matter in issue is pending determination in a suit filed earlier, before a court with jurisdiction to hear the matter. To prove that a matter is sub judice, the applicant must show;
- a. That there is a previously instituted suit that is pending.
  - b. That the matter in the previous suit is between the same parties or between parties under whom they or any of them claim, litigating under the same title.
  - c. That the matter in issue in the previously instituted pending suit is directly and substantially in issue in the second suit.
  - d. That the previously instituted suit is pending before the same court or the court having jurisdiction to hear and determined the matter.
29. The rationale for the doctrine of sub judice was set out in the case of David Ndi & others v Attorney General and others [2021] eKLR, where the court held as follows;
- The rationale behind this provision (section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts ...
30. In the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 other (interested parties) [2021] eKLR, the Supreme Court held as follows;



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 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. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly that the suits are between the same parties or their representatives.

31. Before I determine whether the suit before the trial court was sub judice or not, it is instructive to note that the respondent raised the issue of sub judice by way of a preliminary objection and purported to demonstrate the same by filing submissions on which he attached a copy of the ruling of the court in Machakos Succession Cause No. 12 of 2006 and No. 13 of 2006 (consolidated). It is that annexure to the submissions, that the trial court referred to and relied upon in finding that the preliminary objection filed in the Succession Cause on jurisdiction of that court was still pending and the trial court also made a finding that the High Court was not *functus officio*. I have highlighted this issue because it is now settled law that a preliminary objection can only be raised on pure points of law in regard to pleadings where facts are not in contention.
32. In the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, the court held as follows:

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 off 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.
33. The issue raised before the trial court was a question of sub judice. The 1<sup>st</sup> respondent purported to prove the same by attaching his evidence on his submissions. That piece of “evidence” is what the trial court relied on in arriving at its conclusions. Can a party lawfully prove sub judice by way of a preliminary objection and attach the evidence on the submissions? My view is that the elements for proof of sub judice as discussed earlier in this judgment can only be properly presented before court by way of Notice of Motion attaching the evidence in support thereof to the supporting affidavit. In this case the 1<sup>st</sup> defendant purported to attach his evidence on his submissions. That procedure is strange and cannot be countenanced by this court. Submissions are merely persuasions and are incapable of presenting evidence in court. It was therefore improper for the trial court to rely on evidence that was practically sneaked on to the file. While this court is acutely aware that its interest should be to facilitate substantive justice rather than technical justice, it is my considered view that substantive justice is made complete with procedural justice, as the rules of procedure are the handmaids of substantive justice. I take this view because the question then would be that how does the opposite party respond to “evidence” produced as an attachment to submissions? Do they file replying submissions with their own documents, or a replying affidavit or just bring other documents without any form of presentation to court?



34. I therefore find that the preliminary objection raised before the trial court was not a proper preliminary objection as the same was based on contested matters and therefore the trial court erred in law in framing and determining the same as a preliminary objection. The 1<sup>st</sup> defendant ought to have filed a Notice of Motion and annexed his evidence thereon instead of attaching the same to the submissions.
35. Even where all the elements of the sub judice rule are proved, the only decision the court can make is to stay the proceedings as what section 6 of the *Civil Procedure Act* requires is that the court is barred from proceeding with the trial of a second similar suit. The court has no jurisdiction under section 6 of the *Civil Procedure Act* to strike out a suit on the basis of the sub judice rule. It can only stay the proceedings. It is not in dispute that the case before the Succession Court is pending and not determined. The power to strike out a suit only comes into play where a former suit having all the elements stated in section 6, has now been determined conclusively; and that is defined under section 7 of the *Civil Procedure Act*.
36. In view of the reasons above, I find and hold that the trial court acted erroneously in striking out the Appellants' suit. The upshot of the above is that the appeal is merited, and the same is allowed. The lower court order made on July 27, 2021 be and is hereby set aside and substituted with an order dismissing the 1<sup>st</sup> Respondent's preliminary objection. The costs of the appeal are awarded to the appellant.
37. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 1st DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Ms Kwamboka holding brief for Mr. Nzei for the Respondents

No appearance for the Appellant

Josephine – Court Assistant

