



**Mahadi Energy Limited & another v Premier Bank Kenya Limited (Previously Trading as First Community Bank Limited) & 3 others; Kenya Law Reform Commission (Interested Party); Sha Beel Project Services Limited (Intended Interested Party) (Constitutional Petition E066 of 2024) [2025] KEHC 2488 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2488 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E066 OF 2024**

**G MUTAI, J  
FEBRUARY 6, 2025**

**BETWEEN**

**MAHADI ENERGY LIMITED ..... 1<sup>ST</sup> PETITIONER**

**IBRAHIM HUSSEIN MAHADI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**PREMIER BANK KENYA LIMITED (PREVIOUSLY TRADING AS FIRST  
COMMUNITY BANK LIMITED) ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**KENYA BANKERS ASSOCIATION ..... 3<sup>RD</sup> RESPONDENT**

**CENTRAL BANK OF KENYA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**KENYA LAW REFORM COMMISSION ..... INTERESTED PARTY**

**AND**

**SHA BEEL PROJECT SERVICES LIMITED ... INTENDED INTERESTED PARTY**

**RULING**

1. Before this court are two applications dated 7<sup>th</sup> and 13<sup>th</sup> November 2024 and a notice of preliminary objection dated 2<sup>nd</sup> December 2024.
2. The first application seeks the following orders: -
  - a. Spent;



- b. Spent;
  - c. Spent;
  - d. That this honourable court be pleased to grant leave to the petitioners/applicants to institute contempt proceedings against Premier Bank Kenya Limited and its officers named hereinafter: Jibril Hassan Mohamed, Osman Duale Ahmed, Ahmed Nassir Maalim and Claris Ajwang Ogombo, respectively, the chairman of the board, the chief executive officer, the controlling director/shareholder, and the legal manager of Premier Bank Kenya Limited;
  - e. That this honourable court be pleased to find Premier Bank Kenya Limited and its named officers, Jibril Hassan Mohamed, Osman Duale Ahmed, Ahmed Nassir Maalim and Claris Ojwang Ogombo in contempt of court for wilfully disobeying the conservatory orders issued on 25<sup>th</sup> October 2024;
  - f. That this honourable court be pleased to purge the contempt of the conservatory orders made on 25<sup>th</sup> October 2024 by cancelling /revoking the transfers of LR NO.MN/V1/2428, LR NO. MN/V1/4689, LR NO. MN/V1/4689, LR MN/V1/998, LR 209/5061, Title No. Nairobi/Block 103/434, CR 46162, LR NO. 209/2389/95 Juja Road Nairobi, LR NO.209/5082 Nairobi South C and LR NO.25764 Juja Road Nairobi made by the 1<sup>st</sup> respondent on 31<sup>st</sup> October 2024;
  - g. That this honourable court be pleased to grant leave for the committal to civil jail of Jibril Hassan Mohamed, Osman Duale Ahmed, Ahmed Nassir Maalim and Claris Ajwang Ogombo;
  - h. That this honourable court be pleased to commit Jibril Hassan Mohamed, Osman Duale Ahmed, Ahmed Nassir Maalim and Claris Ajwang Ogombo to civil jail for a period of six (6) months; and
  - i. That the costs of the application be borne by the 1<sup>st</sup> respondent.
3. The application is premised on the grounds therein and the supporting affidavit of Ibrahim Hussein Mahadi, sworn on 7<sup>th</sup> November 2024. Mr Mahadi stated that the honourable court on 25<sup>th</sup> October 2024 issued conservatory orders restraining the respondents from undertaking any dealings, transfer and in any manner whatsoever interfering with LR No. MN/V1/2428, LR No. MN/V1/4689, LR MN/V1/998, LR 209/5061, Title No. Nairobi/Block 103/434, CR 46162, LR No. 209 /2398/95 Juja Road Nairobi, LR No. 209/5082 Nairobi South C and LR No. 25764 Juja Road Nairobi pending hearing and determination of the application dated 18<sup>th</sup> October 2024.
  4. Further, the order, the petition and the application were served upon the respondents on 30<sup>th</sup> October 2024. Despite being served, the 1<sup>st</sup> respondent, on 31<sup>st</sup> October 2024, proceeded to transfer the suit properties to Shabeel Project Service Limited. The respondent moved with haste to make payments for the stamp duty on 30<sup>th</sup> October 2024 before finalizing the transfer on 31<sup>st</sup> October 2024. The transfers of the said suit properties constitute wilful disobedience of the court's orders with the intent of defeating justice.
  5. He stated that court orders are not issued in vain, and those to whom compliance is mandated are not to choose whether to obey or not. He deposed that the most appropriate orders that this court can issue are for the cancellation of the transfers done on 31st October 2024 and committal to civil jail of the named directors and legal manager of the 1st respondent as that would compel them to obey the orders of the court and to purge the contempt. He urged that the said punishment was necessary to safeguard the dignity of this honourable court, to uphold the rule of law and administration of justice.



6. He averred that if the orders sought are not granted, the 1<sup>st</sup> petitioner will suffer irreparable loss. Consequently, Mr Mahadi urged the court to allow the application as prayed.
7. In response, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 21<sup>st</sup> November, 2024. The deponent stated that on the evening of 30<sup>th</sup> October 2024, the 1<sup>st</sup> respondent was served with a court order restraining it from undertaking any dealing, transfer and/or in any manner whatsoever interfering with the properties known as LR No. MN/V1/2428 and LR No. MN/V1/4689. She deposed that after service of the court order, the 1<sup>st</sup> respondent has not undertaken any dealings whatsoever with the subject properties. The subject properties were sold to the 2<sup>nd</sup> interested party via a public auction that took place on 4<sup>th</sup> September 2024.
8. She stated that the petitioners lack locus to seek or obtain any orders as regards the subject matter or allege a violation of court orders as section 98(8), as read with section 104(4), of the Land Act extinguish the petitioners' equity of redemption over the subject properties upon the fall of the hammer in an auction.
9. She averred that on 17<sup>th</sup> October 2024, the 1<sup>st</sup> respondent, through its advocates, duly forwarded all completion documents for the transfer of the subject properties to the 2<sup>nd</sup> interested party's advocates, Messrs Omusolo, Mungai & Co. Advocates. Since then, the 1<sup>st</sup> respondent has not undertaken any dealings with the subject properties as it was the responsibility of the purchasers to effect the transfers. She urged the court to dismiss the application with costs.
10. The 1<sup>st</sup> respondent, through its legal manager, Claris Ajwang Ogombo, filed a further affidavit sworn on 26<sup>th</sup> November 2024. Ms Ogombo stated that the proceedings in Nairobi HC. COMM E556 OF 2024; Ibrahim Hussein Mahadi & 3 Others vs Premier Bank Kenya Limited, proceeded on 26<sup>th</sup> November 2024 before Hon. Lady Justice Njoki Mwangi and that directions. She averred that this showed that contrary to what the petitioners deposed, the matter had not been withdrawn.
11. The 2<sup>nd</sup> interested party filed a replying affidavit through its director Suleiman Abdullahi Omar. He stated that 2<sup>nd</sup> interested party is the bona fide legal owner of the subject properties having purchased the same at auctions conducted on behalf of the 1<sup>st</sup> respondent. He stated that it is trite law that at the fall of the hammer, the sale of the subject properties to the 2<sup>nd</sup> interested party stood concluded at which point the petitioners' equity of redemption was extinguished. Consequently, any subsequent challenge to the exercise of the power of sale by the petitioners would only lie through an action for damages against the 1<sup>st</sup> respondent.
12. He deposed that in respect of the orders issued on 25<sup>th</sup> October 2024, the 2<sup>nd</sup> interested party was not a participant in those proceedings, neither was it served with the ex parte orders nor any accompanying penal notice. The 2<sup>nd</sup> interested party was only joined to these proceedings on 8<sup>th</sup> November 2024 long after the sale of the subject properties was concluded.
13. He stated that LR No.MN/V1/2428 (CR No.144493) Port Reitz Mombasa and LR No. MN/V1/4689 (CR No.46162) Port Reitz were transferred and registered on 31<sup>st</sup> October 2024 in the name of the 2<sup>nd</sup> interested party. Having failed to serve the conservatory orders and join the 2<sup>nd</sup> interested party in these proceedings, the orders automatically lapsed.
14. He further stated that the inhibition orders issued on 8<sup>th</sup> November 2024 are fetter to the 2<sup>nd</sup> interested party as an innocent purchaser for value as provided under Section 99 of the Land Act, 2012. The court should not bar it from enjoying the fruits of its investment. He urged the court to dismiss the application with costs.



15. The second application is dated 13<sup>th</sup> November 2024. It was filed by the 1<sup>st</sup> respondent seeking the following orders: -
  - a. Spent;
  - b. That the ex-parte orders issued by this honourable court on 25<sup>th</sup> October 2024 and 8<sup>th</sup> November 2024 be set aside, vacated and/or reviewed;
  - c. That the honourable court be pleased to issue any further or other orders in the interest of justice; and
  - d. That the costs of this application be provided for.
16. The application is premised on the grounds stated therein and the supporting affidavit of Claris Ajwang Ogombo, sworn on 13th November 2024. The deponent stated that the petitioners obtained ex parte orders on 25<sup>th</sup> October 2024 and 8th November 2024 without disclosing material information to this honourable court. Ms Ogombo deposed that the properties known as LR No. MN/V1/2428, LR No. MN/V1/4689, LR No. 209/2389/95, LR No. 209/5082 and L. R No.25764 had already been sold to third parties under section 98(8) of the Land Act and that the particulars of the sale were already well known to the petitioners. She further deposed that the petitioners lack the requisite locus standi to obtain orders against properties that they do not own or have any legal right over.
17. She stated that the power of courts in respect of remedies and reliefs to chargors under Section 104(4) of the Land Act does not extend to interfering with charged property after it has been sold.
18. Further, the allegations of contempt of court were baseless as properties known as LR No. MN/V1/2428 and LR NO.MN/V1/4689 were transferred by third-party purchasers and not the 1<sup>st</sup> respondent. The claim that the 1<sup>st</sup> respondent illegally auctioned the suit properties is sub judice as the same is directly and substantially in issue in previously instituted suits which are still pending in different courts. The claim on repayment of facilities advanced by the 1<sup>st</sup> respondent prior to 2020 has been settled by way of consent entered into by parties, and thus, the issue is res judicata.
19. She stated that the petitioners have not exhausted other avenues for the resolution of the disputes in question. Ms Ogombo deposed that Islamic banking products are regulated by the Central Bank of Kenya and that complaints in the petition have already been lodged with the Central Bank of Kenya and are pending determination by the regulator.
20. She stated that the application by the petitioners lacks merit and amounts to forum shopping; thus, it ought to be dismissed with costs. Unless the existing conservatory orders were set aside, the 1st respondent will suffer prejudice as the suit properties have already been sold to third parties, and the same will expose the 1st respondent to costly litigation and ultimate loss as a result of a breach of contract.
21. In response the petitioners filed a replying affidavit sworn on 20<sup>th</sup> November 2024 by Ibrahim Hussein Mahadi. He reiterated his position in the first application and stated that the petition challenges the constitutionality of the charge documents registered against the suit properties and the fraudulent manner in which they were transferred, and, therefore, the 1st respondent cannot claim that they lack locus standi, whereas the subject properties belong to them.
22. He stated that the deed of settlement dated 30<sup>th</sup> September 2020 was fraudulently procured through misrepresentation, and it is, therefore illegal and unconstitutional. The consent orders simply adopted the deed of settlement and, therefore, are fraudulent and ought to be set aside.



23. Mr Mahadi stated that the issue that the application was sub judice had not been raised. He denied that the matter was res judicata cannot arise as the issues raised in the petition have not been raised and determined in any other court. He urged that this court has a duty to preserve the properties pending the determination of the constitutional questions and consideration of the issues regarding alleged fraud raised in this matter. He contended that the interested parties were beneficiaries of the illegal acts of the respondents and, therefore, not protected by law. He urged the court to dismiss the application.
24. The notice of preliminary objection dated 2<sup>nd</sup> December 2024 by the 1<sup>st</sup> respondent challenges the court's jurisdiction to hear and/or determine the instant suit and applications on the following grounds:-
- a. That the instant application seeking conservatory orders over the suit properties as well as the entirety of the suit is subjudice, as the petitioners' claims and allegations as captured in their pleadings are directly and substantially in issue in previously instituted and pending suits, as set out hereunder: -
    - i. Nairobi HC. COMM E556 of 2024; Mahadi Energy Limited & Others Vs Premier Bank Kenya Limited: Hon Lady Justice Njoki Mwangi dismissed the petitioners' application for an injunction over the suit properties and stated that the 1<sup>st</sup> respondent is well within its right to sell the suit properties. Interim orders are in effect in this suit.
    - ii. Mombasa HC. COMM MISC E037 of 2024; Akmat Investment Limited vs Premier Bank Kenya Limited, Ibrahim Mahadi & Mahadi Energy Limited; the petitioners herein, being purported defendants in the said suit, have filed a counterclaim in this matter where they challenge the 1<sup>st</sup> respondent's statutory power of sale over the suit properties and essentially are litigating the same issues that are in this petition. interim orders are in effect in this suit.
  - b. That, therefore the instant application and the entirety of the petition is in contravention of Section 6 of the *Civil Procedure Act* which forbids this court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties and where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya or grant the relief claimed;
  - c. That the petitioners lack the requisite locus standi to obtain orders in regard to the properties known as LR No. MN/V1/2428, LR No. MN/V1/4689, LR No. 209/2389/95, LR No.209/5082 and LR No. 25764. The said properties have already been sold to third parties via public auctions that were held on 14th August 2024 and 4<sup>th</sup> September 2024. As such, the petitioners' equity of redemption was extinguished at the fall of the hammer in line with section 104(4) of the *Land Act* and buttressed by the judgement of the Court of Appeal in Civil Appeal in Civil Appeal 133 of 2006; Nancy Kahoya Amadiva vs Expert Credit Limited.
  - d. That in view of the foregoing, the instant application and the entirety of this petition ought to be dismissed with costs.
25. The 1<sup>st</sup> respondent, through its advocates Igeria & Ngugi Advocates, filed written submissions dated 9<sup>th</sup> December 2024 in support of the preliminary objection.
26. On whether the preliminary objection is legally competent, counsel submitted that subjudice is a pure point of law and, therefore, qualifies as a preliminary objection.



27. On whether or not the matter before this court is subjudice, counsel submitted that HC COMM E556 OF 2024 proceeded on 26<sup>th</sup> November 2024. The trial judge gave a date for the highlighting of the written submissions, and therefore, contrary to the petitioners' averments, the matter had never been withdrawn.
28. Counsel relied on section 6 of the *Civil Procedure Act* and submitted that the subject matter in this suit, as well as in the previously instituted suits, is the legality of the 1<sup>st</sup> respondent's statutory power of sale over the suit properties.
29. On whether the petitioners have the locus standi to obtain conservatory orders over the suit properties, counsel submitted that the properties were sold via a public auction that took place on 14<sup>th</sup> August and 4<sup>th</sup> September 2024 and, therefore, the properties are under the legal ownership of bona fide third party purchasers. He urged the court to allow the preliminary objection.
30. The petitioners, through their advocates Gachiri Kariuki & Company Advocates, filed written submissions in opposition to the notice of preliminary objection. Their submissions are dated 20<sup>th</sup> December 2024.
31. On whether the preliminary objection has merit, counsel submitted that the objection does not raise a pure point of law. The former suit Nairobi HCCOMM E556 of 2024; Mahadi Energy Limited & Others vs Premier Bank Kenya Limited & Others has since been withdrawn through the notice of withdrawal dated 10<sup>th</sup> December 2024, introduced through 2<sup>nd</sup> petitioner's affidavit sworn on 17<sup>th</sup> December 2024.
32. Counsel submitted that the petition wasn't sub judice in respect of Mombasa HC COM Misc. E037 of 2024 does not arise as the 1<sup>st</sup> respondent attempts to introduce evidence through the preliminary objection by stating that the petitioners have filed a counterclaim in the matter challenging its exercise of statutory power of sale, which is an issue for determination by the court. The counterclaim is against Akmat Investment Limited (the plaintiff in that suit) and the 1<sup>st</sup> respondent herein. The suit was instituted by a creditor and an investor seeking to secure its interest in a project it was to undertake with the petitioners, which fact has not been controverted.
33. Counsel further submitted that it is not in dispute that Nairobi HCCOM E556 of 2024 has been withdrawn. He urged that where a petition raises issues of great importance, the court may hear the matter even if it is sub judice. He urged that the petition raises issues of great public importance.
34. On the locus standi, counsel submitted that the claim that the petitioners have no locus standi is unfounded. He urged that considering the nature of the petition in question, the petitioners' have locus in respect of the constitutional issues raised.
35. In conclusion, counsel submitted that the preliminary objection lacks merit and, therefore, ought to fail.
36. I have considered the applications, the preliminary objection, the responses thereto and the rival submissions by both counsel for the parties. It is now my duty to determine: -
  - a. Whether the matter is subjudice;
  - b. Whether the petitioners have locus standi; and
  - c. Whether the 1<sup>st</sup> respondent is in contempt of court proceedings.



37. The Court of Appeal for Eastern Africa observed in the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 that: -

“... 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 the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

38. The respondents have argued that this matter is subjudice as similar matters are pending before other courts regarding the subject matter of this dispute. The petitioners have not disputed the same. However, they have submitted that the Nairobi HCCOMM E556 of 2024, *Mahadi Energy Limited & Others vs Premier Bank Kenya Limited & Others*, has since been withdrawn and that Mombasa HC. COMM MISC E037 of 2024; *Akmat Investment Limited vs Premier Bank Kenya Limited, Ibrahim Mahadi & Mahadi Energy Limited* was instituted by a creditor and an investor seeking to secure its interest in a project it was to undertake with the petitioners.

39. The 1<sup>st</sup> respondent, in its further affidavit sworn on 26<sup>th</sup> November by its legal manager, Ms Claris Ajwang Ogombo, annexed the order of 26<sup>th</sup> November 2024 in Nairobi HCCOMM E556 of 2024, whereby the court gave the plaintiffs, who include the petitioners herein 7 days to file and serve a supplementary affidavit and directed that the written submissions would be highlighted on 6<sup>th</sup> February 2025 (that is to say on the date of this ruling).

40. In my view, the existence of the suit before the High Court in Nairobi is undisputed. Although the petitioners say that the same was withdrawn, no proof of the adoption/endorsement of the Notice of the Withdrawal by the Nairobi Court was produced. The filing of the Notice of Withdrawal of Suit does not, of itself, terminate a suit. For such a notice to be effective, it must be endorsed as an order of the court subject to such directions as to costs as the court may give. Since it wasn't stated by the petitioners that the alleged Notice of Withdrawal had been endorsed by the Court then the only conclusion I can draw is that the Nairobi suit is pending determination.

41. Section 6 of the *Civil Procedure Act* 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 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.”



42. Discussing the issue of subjudice, Mativo J, as he then was, in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] KEHC 10142 (KLR) stated as follows:-

“In order to check this very problem, there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice is that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

In this regard, section 6 of the *Civil Procedure Act*<sup>[6]</sup> expressly 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 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.”

43. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR held as follows regarding “sub judice” 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 res 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.”

44. The Nairobi suit is essentially between the same parties as those in the instant petition, save that the instant matter has additional parties. The subject matter is the same. The Nairobi matter was filed before this one.

45. It is settled law that the addition of new parties does alter the substance of the suit. Mativo, J, as he then was, in very pithy remarks, stated as follows in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (supra):-

“ 22. The mere addition of a party or parties does not alter the pith and substance of the suit.”

46. In light of the foregoing, I find and hold that this matter is subjudice as it is between the same parties, and the issues in both matters are similar.

47. Having found that this matter is subjudice, I will not delve into the other issues as they are moot.



48. In conclusion, I hereby order that this Petition shall forthwith be stayed pending the hearing and determination of Nairobi HCCOMM E556 of 2024.
49. Having been obtained in a petition, I have found, as being subjudice, the subsisting interim/conservatory orders are untenable. The same are hereby discharged forthwith.
50. I further direct that this file be returned to the Presiding Judge of the High Court, Mombasa, so that he may take note of the orders issued herein and for appropriate directions, more particularly on the mode of tracking the progress of the Nairobi HCCOMM E556 of 2024.
51. As this is a constitutional petition, each party shall bear its own costs.
52. Mention to be mentioned on 13<sup>th</sup> March 2025 before the Presiding Judge of the High Court, Mombasa, for directions.
53. Orders accordingly.

**DATED AND SIGNED IN MOMBASA THIS 6<sup>TH</sup> DAY FEBRUARY DAY 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Messrs Mwanzia and Origi for the Petitioners;

Mr Njoroge for the 1<sup>st</sup> Respondent;

Mr Kemei for the 2<sup>nd</sup> and 4<sup>th</sup> Respondents and the 1<sup>st</sup> Interested Party;

No appearance for the 3<sup>rd</sup> Respondents;

Ms Kiiru, for the 2<sup>nd</sup> Interested Party

