



REPUBLIC OF KENYA



KENYA LAW
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**Ndungú v Ndiritu & 2 others (Civil Appeal E020 of 2025)
[2025] KEHC 4262 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E020 OF 2025**

RC RUTTO, J

APRIL 2, 2025

BETWEEN

SHADRACK NDUNGÚ APPELLANT

AND

CHRISTINE WAMBUI NDIRITU 1ST RESPONDENT

ABSA BANK KENYA PLC 2ND RESPONDENT

MARGARET WAMUCII NDIRANGU 3RD RESPONDENT

RULING

1. The 1st Respondent herein filed a preliminary objection (PO) to the Appellant's Notice of Motion application dated 28th January 2025. The preliminary objection is to the effect that the Notice of Motion Application flagrantly violates the express provisions of section 6 of the [Civil Procedure Act](#) and it ought to be struck out with costs.
2. The facts leading to the filing of the PO are as follows; the appellant filed a Memorandum of Appeal seeking to appeal the ex-parte orders delivered in Mavoko CMCC Case No 473 of 2023 *Christine Wambui Ndiritu v Absa Bank Kenya PLC & 2 others*. Also filed was a Notice of Motion under certificate of urgency. In that application the appellant/applicant sought the following orders.
 - i. The application be certified urgent
 - ii. Pending inter partes hearing and determination of this application the honourable court be pleased to stay further execution by directing that
 - a. The 1st respondent's advocates Eboso & Company Advocates and Icon Auctioneers be stopped from completing the unlawful execution of the cheques issued on 20/1/2025 by banking and or disbursing the post-dated cheques extorted from the appellant



through gross abuse of courts warrants and purporting to seize the properties of the appellant without giving the mandatory seven days proclamation notice

- b. In the event the aforesaid advocates and or the auctioneer have already banked the cheques and funds cleared, the advocates be directed not to disburse or release the foresaid Kshs.790,610/- or any part thereof but to instead deposit Kshs.790,610/- in court.
 - c. The auctioneers be directed to deposit the colossal Kshs.200,000/- extorted from the Appellant in the pretext of auctioneer charges in court pending taxation of the legitimate auctioneer charges, if any, due against the Appellant
- iii. Pending inter parties hearing and determination of the Notice of Motion dated 23/1/2024 filed in Mavoko CMCC Case No 473 of 2023; *Christine Wambui Nderitu vs Absa Bank Kenya PLC & 2 others*, this Honourable Court be pleased to stay further execution by directing that;-
- a. The Respondent's advocates Eboso & Company Advocates and Icon Auctioneers be stopped from completing the unlawful execution of cheques issued on 20/1/2025 by banking and or disbursing the post-dated cheques dated 27/2/2025 and 3/2/2025 for Kshs.790,610 extorted from the Appellant through gross abuse of the court warrants of purporting to seize the properties of the Appellant without first giving the mandatory seven (7) days proclamation notice.
 - b. In the event the aforesaid advocates and /or the auctioneer have already banked the cheques and funds cleared, the advocate be directed not to disburse or release the foresaid Kshs.790,610 or any part thereof but to instead deposit Kshs790,610 in court.
 - c. The auctioneers be directed to deposit the colossal Kshs 200,000 extorted from the Appellant in the pretext of auctioneer charges n court pending taxation of the legitimate auctioneer charges, if any, due against the Appellant.
- iv. Costs of the application be borne by the Respondents.
3. Upon the application being served upon the parties, the 1st respondent filed its Replying affidavit together with the preliminary objection subject of this Ruling. The PO was canvassed by way of submissions with each party filing their respective submissions.
4. The Respondent submitted that the PO raised a pure point of law as it flagrantly violates the express provisions of section 6 of the *Civil Procedure Act*. That the copy of bundle bearing the order issued by the lower court, the appellant's notice of motion, supporting affidavit and annexures is identical in every material respect to the application before this court for consideration. Further, that the application before the lower court is yet to be determined. Thus, he urges that that the application is a flagrant violation of the express provision of section 6 of the *Civil Procedure Act*. To support his argument, he relies on the Court of Appeal for East Africa case *Mukisa biscuit Manufacturing Ltd v West end Distributors Ltd* (1969) E.A 697 and High Court Miscellaneous Civil Application E387 of 2020 *Rebecca Kerubo Tianta & Peter Njogu vs Parklane Construction Company Limited*.
5. He urged the court to uphold the PO by finding that it raises pure points of law, and that the application is sub judice and offends the express provision of section 6 of the *Civil Procedure Act*.
6. In response, the appellant/applicant submitted that the instant proceedings relate to appellate jurisdiction and not original jurisdiction of this court; the court has jurisdiction to hear appeals from decision of subordinate court including orders declining to certify applications urgent and /or issue



interim stay; that the jurisdiction to issue stay pending appeal is unfettered as long as the conditions of order 42 rule 6 are satisfied.

7. It was also submitted that the PO raises issues of facts that cannot be properly addressed as a PO; that the matter in issue is not the same matter in issue in the court below; the sub judice rule in section 6 refers to the stay of suit and not striking out of the suit and that upholding the PO will be an absurdity in law.
8. While making reference to the case of Mukisa Biscuit (Supra) the appellant submitted that the objection requires the court to investigate the facts of the application filed in the court below before making a determination which is not a proper preliminary objection. Further, that section 6 requires stay of similar proceedings but not their striking or dismissal.
9. It was their submission that the appeal herein challenges the decision of the court below to certify an application urgent and grant a stay pending inter partes hearing of the application for stay in the court below. That the prayer to certify the said application urgent and grant the stay pending inter partes hearing of the motion in the court below is moot, because the said prayers are no longer in issue or subject of litigation in the court below. Thus, he urged that an appeal challenging the failure of the court below cannot be said to be sub judice because the issue in challenge is no longer alive in the court below.
10. They further urged the court not to uphold the objection as upholding the same will create an absurdity in law in the sense that it will become impossible to challenge decisions refusing to certify applications urgent and issue interim stay orders on appeal.

Analysis and Determination

11. Having reviewed the Preliminary objection and parties' submissions, the preliminary issue of law arising for determination is whether this application is sub judice and contravenes the provisions of section 6 of the *Civil Procedure Act*.
12. In this instance, it is common ground that the applicant first filed an application in Mavoko CMCC case No 473 of 2023 *Christine Wambui Nderitu v Absa Bank Kenya Plc & 2 others* seeking similar orders of stay as those sought in this appeal. Upon filing the application, the lower court declined to certify the said application as urgent and did not grant any orders but instead directed that the application be mentioned on 17/2/2025.
13. The applicant was aggrieved by the directions issued and proceeded to lodge this appeal by filing the Memorandum of appeal together with a Notice of Motion application under certificate of urgency. A perusal of the application shows that it first seeks to stay further execution pending inter partes hearing and determination of the application and secondly that the court be pleased to stay further execution pending hearing and determination of the Notice of Motion application dated 23/1/2024 filed in Mavoko CMCC case No 473 of 2023. A copy of the Notice of Motion Application dated 23/1/2024 was attached to this application. Notably, the prayers sought in the application mirrors those sought in the application pending determination by this court.
14. Thus, the issue whether the application contradicts Section 6 of the *Civil Procedure Act*. Section 6 provides as follows: -“6. 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.”



15. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, the Supreme Court stated: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th 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.”
16. Guided by the above it is clear that under section 6 of the *Civil Procedure Act* a court shall not proceed with the trial of any suit or proceeding if the matter in question is already directly and substantially an 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 to grant the relief sought.
17. In this instance, it is apparent that the applicant is substantively seeking similar orders as those sought in the application dated 23/1/2025, the same is yet to be determined by the lower court where it was first filed. That application also involves similar parties. Thus, as at now there are two courts faced with determination of an application raising substantially similar issues.
18. This is a clear breach of the provisions of section 6 of the *Civil Procedure Act*, since as clearly pointed out by the respondents, the copy of bundle bearing the order issued by the lower court, the appellant’s Notice of Motion, supporting affidavit and annexures is identical in every material respect to the application before this court for consideration. It is also undoubted that the application before the subordinate court was filed prior to the present application.
19. This court acknowledges the applicant’s argument that it is being called upon to exercise its appellate jurisdiction rather than its original jurisdiction. I recognize that this court has the powers to hear appeals from subordinate courts decisions including those where the subordinate court has exercised its discretionary jurisdiction. However, in this instance, the court notes that the application before it seeks similar orders as those still pending determination at the lower court. If the appellant had not sought similar orders in the lower court, the application would have been appropriate for appeal rather than being considered sub judice.
20. In the circumstance therefore the Preliminary Objection dated 31st January 2025 succeeds. The applicant has argued that under section 6 of the Civil Procedure Rules, the Court is not obliged to strike out or dismiss the application but rather stay the subsequent application pending the determination of the earlier application.
21. Considering that this Court is an appellate court to the subordinate court, staying the application will not serve any purpose beyond clogging the court’s diary. In any event, upon determination by the subordinate court, any of the parties still retain the right to appeal before this Court. This can only be possible if there is no pending appeal over the same subject matter.



22. It is my view that the applicant's position only holds where the court is exercising similar jurisdiction. My understanding of section 6 of the *Civil Procedure Act* is that the remedy to stay proceedings is just one of the ways of not proceeding with a matter. The other option is to have the matter struck out which is not a bar for any future filing of a similar application. What remains unavailable is dismissing the proceedings as this presupposes that a decision has been taken on the merits.
23. From the foregoing, I am satisfied that the PO having been found to be of merit, the application should be struck out. Mention on 8th May 2025 for directions on hearing of the appeal

DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF APRIL 2025.

RHODA RUTTO

JUDGE

In the presence of;

Sam Court Assistant

