



REPUBLIC OF KENYA



**Opiyo v KCB Bank Kenya Limited & 2 others; Omboto (Interested Party)
(Civil Case E005 of 2025) [2025] KEHC 9801 (KLR) (7 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E005 OF 2025**

**A MABEYA, J
JULY 7, 2025**

BETWEEN

BENARD JAMES OKAYO OPIYO PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

LEGACY AUCTIONEERS SERVICES 2ND DEFENDANT

WATTS AUCTIONS 3RD DEFENDANT

AND

JOHNES AKEL OMBOTO INTERESTED PARTY

RULING

1. This ruling determines the Preliminary Objection dated 5/3/2025 by the Interested Party.
2. The plaintiff moved the Court *vide* a Notice of Motion dated 20/2/2025 in which he sought a temporary injunction against the defendants restraining them from evicting him from the property known as LR No. 13432/77 pending the hearing and determination of the application and suit.
3. The plaintiff's application was accompanied by a plaint dated 14/2/2025 in which he sought a declaration that the sale of the suit property to the interested party be declared null and void and that a fresh, lawful auction with a true valuation of the property be undertaken.
4. The defendants filed a joint defence dated 17/3/2025 in which they denied the allegations made by the plaintiff and asserted that, the sale of the suit property to the interested party was lawful. That the same was occasioned by the plaintiff's default in settling loans advanced by a Lender.
5. The preliminary objection was raised on the grounds that the suit was sub judice to *Kisumu Civil Suit No. E044 of 2021* and *Kisumu MCELC No. E024 of 2023* both of which involved the same parties as



in this case. That a similar application had been heard and determined in those suits and as such, the present application ought to be struck out with costs.

6. The objection was determined by way of submissions. The defendants opted not to participate in the determination of the preliminary objection.
7. Mr. Omodi for the interested party submitted that the prayers sought by the plaintiff were similar to those sought in *Kisumu E044 of 2021* which was still pending whereas the prayers sought in the plaintiff's application were similar to those sought in an application in *Kisumu MCELC E024 of 2023* and was therefore *res judicata*. He relied on *Benard Mugo Ndegwa v James Gitbae* [2010] eKLR & *Coast Bus & Another v Chepkoech* [2024] eKLR and urged the court to strike out the application with costs.
8. Mr. Otieno Obiero for the plaintiff submitted that, the Preliminary Objection was bad in law as it must be on a pure point of law, derived from the pleadings and must be undisputed. That issues *res judicata* and *sub judice* require evidence and interrogation. That the ruling in both *Kisumu E044 of 2021* and *Kisumu MCELC E024 of 2023* were both struck out for want of jurisdiction and thus the preliminary objection ought to be dismissed with costs.
9. I have considered the pleadings herein as well as the submissions made by both parties. The only issue for determination is whether the preliminary objection is merited.
10. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Eastern Court of Appeal held 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.

...

... 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’.”
11. Further, a preliminary objection must stem from the pleadings and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro v Mbaja* [2005] 1KLR 141, where it was held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”
12. The interested party contended that the present suit was similar to two other matters, to wit, *Kisumu Civil Suit No. E044 of 2021* and *Kisumu MCELC No. E024 of 2023* in which the plaintiff had raised similar issues and which also involved the same parties herein.
13. I have considered the entire record. I find the objection not to have been well intended. I say so because, the interested party did not disclose all the material particulars of his objection. He contended that there had been two other suits, *Ksm CIV Suit No E044 of 2021* and *Ksm MCELC No. E024 of 2023* that had been filed. That the doctrines of *res judicata* and *sub-judice* applied.



14. He failed to inform the case that there were two decisions which been made on 24/1/2025 and 21/5/2025, respectively which had found that the said two courts did not have any jurisdiction to determine the present case. The suit was therefore withdrawn in the first case while in the second it was struck out.
15. It should be remembered that for any of the said two doctrines, sub-judice and *res judicata* to apply, the constant indicator is that the suits must have been filed in courts of competent jurisdiction. In the present case, those very courts had found that they had no jurisdiction.
16. In the circumstances, I find the preliminary objection dated 5/3/2025 to be without basis and hereby dismiss the same with costs of Kshs.20,000/-.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

