



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Waibara & another (Civil Appeal 252 of 2023)
[2024] KEHC 9501 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 252 OF 2023
FN MUCHEMI, J
JULY 25, 2024**

BETWEEN

JOSEPH MUTURI WAINAINA APPELLANT

AND

CLEMENT KUNG’U WAIBARA 1ST RESPONDENT

WINNIE WAIRIMU MBURU 2ND RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. J. A. Agonda
(PM) delivered on 25th April 2023 in Ruiru SPMCC No. E546 of 2022)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Ruiru Principal Magistrate in SPMCC No. E456 of 2022 in respect of dismissal of a preliminary objection dated 13th December 2022 on the premise that the said suit was sub judice as there was a similar matter in Thika Environment and Land Court ELC Case No. 6 of 2021 between the same parties Joseph Muturi Wainaina vs Clement Kungu Waibara.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 5 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in failing to consider that the parties in High Court Thika ELC Case No. 6 of 2021 are different from those in Ruiru SPMCC No. E546 of 2022;
 - b. The learned trial magistrate erred in law and in fact in failing to consider that the prayers sought in ELC Case No. 6 of 2021 are different from those sought in Ruiru SPMCC No. E546 of 2022;



- c. The learned trial magistrate erred in law and in fact in failing to appreciate that the causes of action in both courts were different and both of them ought to proceed separately.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on Section 6 of the *Civil procedure Act* and submits that the parties in ELC Case No. 6 of 2021 are Joseph Muturi Wainaina and Clement Kung'u Waibara whereas the parties in SPMCC No. E546 of 2022 are the appellant herein as the plaintiff and both the respondents as defendants.
5. The appellant further argues that the prayers sought in ELC Case No. 6 of 2021 different from those in SPMCC No. E546 of 2022. In the ELC matter, the appellant sought for orders of an injunction restraining the 1st respondent from interfering with his quiet enjoyment of the property known as LR. No. RUIRU/RUIRU EAST BLOCK 7/649; a declaration that the agreement entered into by the appellant and the 1st respondent on 28th June 2018 is rescinded; a refund of Kshs. 915,000/- being rent and deposits collected illegally from Geoffrey Kuria; Kshs. 36,000/- per month as from January 2021 being the extra security cost that the appellant is incurring until the time the 1st respondent shall desist from interfering with the suit property; mesne profits and general damages the appellant submits that in SPMCC No. E546 of 2022, the orders sought were a refund of Kshs. 195,000/- which was a friendly loan granted to the 1st respondent and deposited in the 2nd respondent's account. The appellant argues that the matters in the two cases are independent and have no relation whatsoever. Further, the appellant relies on the case of Daniel Kipkemoi Bett & Another vs Joseph Rono [2022] eKLR and submits that the two suits raise independent contentious issues and ought to be heard separately. The appellant further submits that SPMCC No. E546 of 2022 is not sub judice as there would be no duplication of the reliefs or conflict that would result in confusion or conflict.
6. Relying on the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696, the appellant argues that the preliminary objection as raised by the respondents did not disclose a pure point of law. To support his submissions, the appellant relies on the cases of *Pacis Insurance Company Limited vs Ichanga (Commercial Case E004 of 2022)* [2022] KEHC 16303 (KLR) (13 December 2022) (Ruling) and Peter Njuguna Gitau vs Daniel Kiprono Kiptum & 3 Others (2022) eKLR.

The Respondents' Submissions

7. The respondents submit that the appellant's claim before the trial court was for a sum of Kshs. 195,000/- allegedly given to them as a loan. The respondents state that they contended before the ELC Court that the said amount of Kshs. 195,000/- was paid to the 1st respondent as part of rent collected by the appellant on behalf of the 1st respondent. From the foregoing, the respondents argue that the inescapable conclusion was that the contest on the sum of Kshs. 195,000/- was directly and substantively in issue before the ELC Court.
8. The respondents further submit that the ELC matter was filed by the same appellant and it was filed prior to the suit before the magistrate's court. As such, the respondent submit that the suit filed in the trial court was an afterthought jolted by the counterclaim filed in the ELC Court.
9. It was further submitted that the ELC Court delivered its judgment in Thika ELC Case No. E006 of 2021 on 9th April 2024 and made a determination over the dispute of the sum of Kshs. 195,000/-. The court found that the defendant led unchallenged evidence that Kshs. 130,000/- was with respect



for rent for two units for the month of December 2019 and one unit for the month of January 2020. Thus, the respondents submit that while the decision of the ELC Court remains unchallenged, the instant appeal amounts to a mere academic exercise.

10. The respondents submit that the appellant's suit before the Senior Principal Magistrate's court was a mischaracterization of the real controversy between the parties as it was intended to throw the court into a spin. The suit was filed one year after the defence and counter claim in Thika ELC Case No. 6 of 2021 was filed.
11. The respondents rely on Section 6 of the *Civil Procedure Act* and the cases of Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission and 16 Others [2020] eKLR and submit that the purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties. The respondent submit that save for the 2nd respondent herein, the parties before Thika ELC case were the same parties before the magistrate's court. Further the issue in dispute before the magistrate's court was directly and substantively before the ELC Court. A determination of that issue has since been rendered by the superior court and thus there is nothing more to be determined by the magistrate's court.
12. Relying on the cases of A.N.N. vs R.M.K [2021] eKLR; Daniel Kipkemoi Bett & Another vs Joseph Rono [2022] eKLR the respondents submit that the concept of sub judice provides that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying the same issue.

Issue for determination

13. The main issue for determination is whether the appeal has merit.

The Law

14. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

15. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

16. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

17. The doctrine of sub judice is established in Section 6 of the *Civil Procedure Act* and provides:-

No court shall proceed with the trial of any suit or proceedings 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 the 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.

18. Mativo J. (as he then was) discussed the concept of sub judice in *Republic vs Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya* [2020] eKLR where he stated as follows:-

.....there exists the concept of sub judice which in Latin means “under judgment.” It denotes that a matter is being considered by a court or judge. The concept of sub judice 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.

19. The Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)*[2020] eKLR 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 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.

20. The key words in applying the sub judice rule is that the matter in issue is directly and substantially in issue in the previous suit. The appellant herein instituted a suit in the Environment & Land Court ELC Case No. E006 of 2021 between himself and the 1st respondent herein. The cause of action in the said suit arose from an agreement between the appellant and the 1st respondent for the sale and purchase of L.R. NO. RUIRU/RUIRU EAST BLOCK 7/649 for the sum of Kshs. 25 million. The sum of Kshs. 5 million was to be paid upon execution of the agreement and the balance of Kshs. 20 million was payable within 90 days of the date of the agreement. The 1st respondent filed his defence and counterclaim on



the basis that the terms of the agreement were altered in respect of the payment of the balance of the purchase price of Kshs. 1 million with the effect that the balance owed to the appellant would be settled through rental income. The appellant testified that there was no oral agreement between him and the 1st respondent with respect to the balance of the purchase price. He led evidence to the effect that the 1st respondent requested him to advance a loan in the sum of Kshs. 130,000/- and Kshs. 195,000/- which he obliged and paid through the 1st respondent's wife's bank account in line with the request. However, the ELC Court found that the appellant failed to table any documentary evidence such as a loan agreement in respect to the alleged loan.

21. Looking at the pleadings filed in SPMCC No. E546 of 2022, the appellant filed a plaint against the two respondents herein for the refund of a loan in the sum of Kshs. 195,000/- paid to the 1st respondent through the 2nd respondent's bank account. A cursory look of the pleadings of two suits, the parties are similar save for the 2nd respondent in the case before the Senior Principal Magistrate who is an additional party. This means that the 2nd respondent was not a party in SPMCC No.E546 of 2022. It is evident from the pleadings that the cause of actions in both suits were substantially similar as the issue of Kshs. 195,000/- arose from the fact that there was an oral agreement between the parties to pay the balance of the purchase price with the appellant collecting rent on behalf of the 1st respondent and remitting the funds to him upon completion of the purchase price.
22. Further, the test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res judicata in the subsequent suit. The ELC Court determined the issue of the sum of Kshs. 195,000/- vide its judgment delivered on 9th April 2024 ,where the court found that the 1st respondent led unchallenged evidence that the Kshs. 130,000/- was with respect to rent for two units for the month of December 2019 and one unit for the month of January 2020. Thus, it is not in dispute that the matter in the Senior Principal Magistrate Court SPMCC No. E546 of 2022 is res judicata taken together with ELC Court case that has already been determined.
23. The appellant argued that the preliminary objection dated 13th December 2022 was not a point of law. I beg to differ with this argument in that the preliminary objection was based on Section 6 of the [Civil Procedure Act](#) provision of which describe the sub judice rule. The fact that the issues in the Thika ELC case were similar to those in the Ruiru SPM case as I have already stated. The said issues had already been decided by a court of competent jurisdiction being the ELC Court. The parties were the same in both suits save for the 2nd respondent who was added in the case before the Senior Principal Magistrate.
24. In my considered view that all these facts put together render the Ruiru Magistrate case sub judice in that all the issues in the second suit were the same issues decided by the ELC court. All the said issues arose from the same transaction of sale and purchase of L.R. Ruiru/Ruiru East Block 7/649 and the payment of the purchase price thereto.

Conclusion

25. It is my considered view that the appellant's second suit before the Ruiru Magistrate Court violated the rule of sub judice and as such the preliminary objection was merited as was decided by the honourable Magistrate.
26. I find no merit in this appeal and it is hereby dismissed with costs to the respondents.
27. It is hereby so ordered.

JUDGMENT DEIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JULY 2024.



F. MUCHEMI
JUDGE

