



REPUBLIC OF KENYA



**Kagunda & another v Thumbi & 15 others (Civil Appeal E230 of 2022)  
[2024] KEHC 11869 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11869 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E230 OF 2022  
TW OUYA, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**ESTHER NJERI KAGUNDA ..... 1<sup>ST</sup> APPELLANT**

**EUNICE WANJIRU MWARIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE MBUTHIA THUMBI ..... 1<sup>ST</sup> RESPONDENT**

**PETER MUIGAI THUMBI ..... 2<sup>ND</sup> RESPONDENT**

**KAREN WANJIKU THUMBI ..... 3<sup>RD</sup> RESPONDENT**

**SAM MUREITHI MURIOKI T/A UNCLE SAM CITY ..... 4<sup>TH</sup> RESPONDENT**

**GODFREY KAHITI MIHANGO ..... 5<sup>TH</sup> RESPONDENT**

**MOSES MUNGAI MUIGAI ..... 6<sup>TH</sup> RESPONDENT**

**ELIJAH KAMUYU NGUGI ..... 7<sup>TH</sup> RESPONDENT**

**PRISCILLA WANJIKU ..... 8<sup>TH</sup> RESPONDENT**

**ELIJAH MBURU MBUGU ..... 9<sup>TH</sup> RESPONDENT**

**FRANCIS KAHWAI NJOROGE ..... 10<sup>TH</sup> RESPONDENT**

**JOSEPH MWANGI THIONGO ..... 11<sup>TH</sup> RESPONDENT**

**JULIUS WANJOHI MAINA ..... 12<sup>TH</sup> RESPONDENT**

**LYDIAH WANJIKU MBUGUA ..... 13<sup>TH</sup> RESPONDENT**

**MARGARET WANJIKU NJOROGE ..... 14<sup>TH</sup> RESPONDENT**

**DAN KARANJA ..... 15<sup>TH</sup> RESPONDENT**

**ANTHONY WAITHAKA ..... 16<sup>TH</sup> RESPONDENT**



*(Being an appeal against the ruling and order of the Hon. C.A Otieno (SPM)  
delivered on 16th September, 2022 in Ruiru CMCC No. E392 OF 2021)*

**JUDGMENT**

**Background**

1. This appeal emanates from the Ruling delivered on 16<sup>th</sup> September, 2012 in Ruiru CMCC No. E392 of 2021 (hereinafter Lower Court suit). The proceedings before the lower Court were commenced by way of a plaint filed by Godfrey Kahiti Mihango, Moses Mungai Muigai, Elijah Kamuyu Ngugi, Priscilla Wanjiku, Elijah Mbutu Mbugu, Francis Kahwai Njoroge, Joseph Mwangi Thiongo, Julius Wanjohi Maina, Lydia Wanjiku Mbugua, Margaret Wangari Njoroge, Dan Karanja and Anthony Waithaka the Plaintiffs before the lower Court (hereafter the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> & 16<sup>th</sup> Respondent/Respondents) as against Esther Njeri Kagunda & Eunice Wanjiru Mwaria the 1<sup>st</sup> & 2<sup>nd</sup> Defendants before the lower Court (hereinafter the 1<sup>st</sup> & 2<sup>nd</sup> Appellant/Appellants) and George Mbuthia Thumbi, Peter Muigai Thumbi, Karen Wanjiku Thumb & Sam Mureithi Murioki t/a Uncle Sam City the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants before the lower Court (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondent/Respondents) seeking inter alia an order compelling the 1<sup>st</sup> & 2<sup>nd</sup> Appellant and 1<sup>st</sup> to 4<sup>th</sup> Respondent to refund all the full deposits paid by the 5<sup>th</sup> to 16<sup>th</sup> Respondent as security over shops demised from LR. Ruiru/Town/70, an order compelling the Appellants and 1<sup>st</sup> to 4<sup>th</sup> Respondent to pay the 5<sup>th</sup> to 16<sup>th</sup> Respondent all interest accrued from the said deposit as from the 1<sup>st</sup> July, 2021 at Court's rate, costs of the suit & interest.
2. The gist of the 5<sup>th</sup> to 16<sup>th</sup> Respondents averments before the lower Court were that at all material times thereto, they were lawful tenants renting and occupying all those shops demised from all that building erected on LR/Ruiru/Town/70 (hereinafter the suit property) situate in Ruiru municipality up until the 30<sup>th</sup> June 2021 whereas the Appellants and 1<sup>st</sup> to 3<sup>rd</sup> Respondent were lawful personal representatives of the estate of Johah Mburu Karimi (Deceased), at the time being the registered owner of all that building erected on the suit property meanwhile the 4<sup>th</sup> Respondent was the lawful agent managing all the building erected on the suit property on behalf of the Appellants, 1<sup>st</sup> to 3<sup>rd</sup> Respondent and estate of the Deceased. It was further averred that at all material time the 5<sup>th</sup> to 16<sup>th</sup> Respondents were paying a monthly rent which had been settled as at 30<sup>th</sup> June, 2021 and equally made payments as deposit and security over the suit premises.
3. That the Appellants and 1<sup>st</sup> to 4<sup>th</sup> Respondent terminated the tenancy relationship with the 5<sup>th</sup> to 16<sup>th</sup> Respondents on accord of disposal of the suit property together with the suit premises thereon to a third party which notice of completion of sale they came to learn of on 18<sup>th</sup> May, 2021 with a handover thereafter to 9<sup>th</sup> Respondent taking place on 1<sup>st</sup> July, 2021. It was further averred that there being not tenancy relationship between the parties before the lower Court the 5<sup>th</sup> to 16<sup>th</sup> Respondents were entitled to a refund of all the security deposit paid to the Appellants and 1<sup>st</sup> to 4<sup>th</sup> Respondent during the subsistence of the tenancy relationship that preceded the said sale, of which they now claim.
4. The Appellants filed a joint statement of defence and counterclaim denying the key averments in the Plaint. Meanwhile sought judgment in their Counter-claim for the sum of Kshs. 1,036,000/- as against the 1<sup>st</sup> to 4<sup>th</sup> Respondents and costs of the counterclaim.
5. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondent on their part filed a joint statement of defence equally denying the key averments in the Plaint and defence to Appellants counterclaim.



6. The 4<sup>th</sup> Respondent on his part filed a statement of defence also denying the key averments on the plaint.
7. On 14.07.2022, the 1<sup>st</sup> to 4<sup>th</sup> Respondent moved the lower Court vide a motion expressed to be brought pursuant to Sections 1A, 1B, 3A, 7 and 6 of the Civil Procedure Act (CPA), Order 2 Rule 15 of the Civil Procedure Rules (CPR) seeking inter alia that the honorable Court be pleased to strike out and dismiss the Plaint filed therein for failure to disclose any reasonable cause of action and or otherwise being an abuse of the Court process; that the honorable Court be pleased to strike out and dismiss the Appellants Counterclaim against 1<sup>st</sup> to 4<sup>th</sup> Respondent as the Court lacks jurisdiction to entertain the same; that the honorable Court be pleased to dismiss the Appellants Counterclaim against 1<sup>st</sup> to 4<sup>th</sup> Respondent as the same offends the provisions of Section 7 of the CPA for being Res Judicata; that the honorable Court be pleased to strike out and dismiss the Appellants Counterclaim against 1<sup>st</sup> to 4<sup>th</sup> Respondent as the pendency of this suit is in defiance of the Order issued on 5<sup>th</sup> March 2020 by the High Court of Kenya in Kiambu Succession Cause Number 104 of 2017, as such the Counterclaim is fatally defective; and costs of the motion.
8. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the 3<sup>rd</sup> Respondent, who gist is that on 31<sup>st</sup> March 2022 certain germane paragraphs in the Plaint were struck off by the lower Court of which formed the substratum of the suit and their being struck out has left the case with no discernible cause of action thereby leaving the suit ripe for dismissal with costs. It was further deposed that suit property belonged to the estate of the Deceased and was sold to the 9<sup>th</sup> Respondent whereas the lower Court lacks jurisdiction to entertain the issues canvassed in the Appellants counterclaim as they are issues that have either been previously adjudicated upon or are matters that are pending adjudication in the High Court of Kenya in Kiambu Succession Cause Number 104 of 2017. That any claim in respect of intermeddling as canvassed in the Counter-claim ousters the trial Court's jurisdiction by dint of Section 45 of the Law of Succession Act. She went on to depose that the High Court Succession matter was still pending and by dint of the lower Court suit being similar to the one before the superior Court, the same is caught up by Sub-judice. She equally deposed that the issue of the rent outstanding in respect of the suit premises is also a question before the Business Premises Rent Tribunal (BPRT) in Nairobi vide Tribunal Case No. 103 of 2020. She concludes by deposing that the filing of multiplicity of suits amounts to an abuse of the Court process leading to conflicting decisions, waste of judicial time and resources whereas the Appellants are guilty of forum shopping which ought to be frowned upon by the honorable Court.
9. The Appellants opposed the motion through a replying affidavit whose gist was that the issues raised in the High Court of Kenya in Kiambu Succession Cause Number 104 of 2017 are different from the ones canvassed in the suit and Counter-claim whereas the filing of the Business Premises Rent Tribunal Case No. 103 of 2020 was by tenants as against the Appellants however with the transfer of the suit premises to the 9<sup>th</sup> Respondent, the Appellants would no longer levy distress on a property that no longer belonged to the Deceased's estate.
10. In rejoinder by way of a supplementary affidavit, the 3<sup>rd</sup> Respondent maintained that the honorable Court lacked jurisdiction to entertain the Appellants counterclaim on accord of the fact that the issues appertaining intermeddling was a preserve of the probate Court that was dealing with the issues in respect of the estate of the Deceased.
11. On 18<sup>th</sup> July, 2022, the 5<sup>th</sup> to 16<sup>th</sup> Respondents withdrew their suit with an order of costs issuing in favour of the Appellants whereafter the 1<sup>st</sup> to 4<sup>th</sup> Respondent's motion was disposed of by way of



written submissions. The lower Court's ruling allowing the 1<sup>st</sup> to 4<sup>th</sup> Respondent's motion provoked the instant appeal, which is based on the following grounds: -

- “ 1. The Honorable Magistrate erred in law and fact when she found that BPRT No. 103/2020 Godfrey Kahiti Mihango & Others v Esther Njeri Kagunda & Others which was initiated by the 5<sup>th</sup> -16<sup>th</sup> Respondents on 28<sup>th</sup> January 2020 related to rents payable by the 5<sup>th</sup> -16<sup>th</sup> Respondents between October 2021 and May 2022 yet the law on distress for rent provides for distress in arrears as opposed to in advance.
2. The honorable Magistrate erred in law and fact when she found that BPRT No. 103/2020 Godfrey Kahiti Mihango & Others v Esther Njeri Kagunda & Others which was initiated by the 5<sup>th</sup> -16<sup>th</sup> Respondents on 28<sup>th</sup> January 2020 was on the rent payable by the 5<sup>th</sup> -16<sup>th</sup> Respondents between October 2021 and May 2022 yet the same had not become due on 28<sup>th</sup> January 2021 so as to be the cause of action in BPRT No. 103/2020 Godfrey Kahiti Mihango & Others v Esther Njeri Kagunda & Others.
3. The honorable Magistrate erred in law and fact when she found that the Appellants could recover the rent due to them from the 5<sup>th</sup> -16<sup>th</sup> Respondent between October 2021 and May 2022 in BPRT No. 103/2020 Godfrey Kahiti Mihango & Others v Esther Njeri Kagunda & Others yet the estate of Jonah Thumbi Karimi sold LR. Ruiru/T/70 hence cannot possibly levy distress on a property that no longer belonged to them as the then Landlord-Tenant Relationship had already been terminated.
4. The honorable Magistrate erred in law and fact when she ignored that the distress leading to the filing of BPRT No. 103/2020 Godfrey Kahiti Mihango & Others v Esther Njeri Kagunda & Others was on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents distress on rent due before 28<sup>th</sup> January 2020 and not that due between October 2020 and May 2021 hence the two rents though relating to the same premises did not relate to the same issue.
5. The honorable Magistrate having accepted that the rent due for division in Kiambu HCSC No. 104 of 2017 Estate of Jonah Thumbi (Deceased) did not amount to the same matter in issue contradicted herself when she found that the rent being distress in BPRT No. 103/2020 Godfrey Kahiti Mihango & Others v Esther Njeri Kagunda & Others before 28<sup>th</sup> January 2020 amounted to the same issue.” (sic)

12. In light of above itemized grounds of appeal, the Appellants pray that: -

- “ a) The appeal be allowed and this Court does set aside the orders of 16<sup>th</sup> September 2022 and in place dismiss the 1<sup>st</sup> -4<sup>th</sup> Respondent's application dated 5<sup>th</sup> July, 2022.
- b) The Appellants counterclaim as against the 5<sup>th</sup> – 16<sup>th</sup> Respondent and claim as against the 1<sup>st</sup> – 4<sup>th</sup> Respondent be reinstated for hearing on merit.



- c) The costs of this appeal and the lower Court be granted to the Appellants against the Respondents.” (sic)

13. The 1<sup>st</sup> to 4<sup>th</sup> Respondents equally aggrieved by the ruling of the lower Court preferred a Cross-Appeal premised on the following grounds: -

- “ 1. That the learned trial Magistrate erred in law and fact in failing to consider all the 3<sup>rd</sup> to 6<sup>th</sup> Appellants prayer to strike out and dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Appellants counterclaim against the Respondents and claim against the 3<sup>rd</sup> to 6<sup>th</sup> Appellants dated 12<sup>th</sup> October 2021 for want of jurisdiction to entertain the same, as issues of intermeddling with the estate of the Deceased are matters reserved and to be dealt with by Probate Courts which in this instant is the High Court at Kiambu, as provided under Section 47 of the Law of Succession Act.
2. That the learned trial Magistrate erred in law and fact in holding that the Senior Principal Magistrate Court at Ruiru Civil Case Number E392 of 2021 was not Sub-judice Kiambu High Court Succession Cause Number 104 of 2017 despite the fact that the High Court at Kiambu issued an order for status quo on 5<sup>th</sup> March, 2020 respecting the Respondent’s tenancy be maintained pending hearing and determination of a summons application by the Respondents against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants concerning distress for rent dated 28<sup>th</sup> February 2022 that is yet to be determined the very issue raised by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in their counterclaim against the Respondents and claim against the 3<sup>rd</sup> to 6<sup>th</sup> Appellants.
3. That the learned trial Magistrate erred in law and fact in holding that the Senior Principal Magistrate Court at Ruiru Civil Case Number E392 of 2021 was not Sub-judice Kiambu High Court Succession Cause Number 104 of 2017 without considering that the orders issued by the High Court maintaining the status quo have never been appealed against, set aside or vacated hence the counterclaim against the Respondents and claim against the 3<sup>rd</sup> to 6<sup>th</sup> Appellants by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were filed before the Chief Magistrates Court at Ruiru Civil Case Number E392 of 2021 against the express orders of the High Court pending hearing and final determination of the Respondent’s application before the High Court.
4. That the learned trial Magistrate erred in law and fact in failing to consider that since the High Court matter was still pending and being similar to the one filed before the trial Magistrate Court, the suit was itself caught up by the Sub-judice rule as the matter involved the same parties over the same subject matter and therefore the Court lacked jurisdiction to entertain the claim as the same amounts to abuse of the process of the Court.
5. That the learned trial magistrate erred in law and fact in holding that the counterclaim and claim against the 3<sup>rd</sup> to 6<sup>th</sup> Appellants in not Res-judicata Kiambu High Court Succession Cause Number 104 of 2017 despite the fact that the dispute in the counterclaim and claim against the 3<sup>rd</sup> and 6<sup>th</sup> Appellants was the exact same issue between the parties, who were all beneficiaries of the



estate of the Deceased, in Kiambu High Court Succession Cause Number 104 of 2017 where the honorable Lady Judge Justice Mary Kasango already gave a determination on the same vide a ruling delivered on 6<sup>th</sup> July 2022 at the High Court in Kiambu.” (sic)

14. Similarly, light of above itemized grounds of appeal, the 1<sup>st</sup> to 4<sup>th</sup> Respondents (Appellants) sought that: -

- “ 1) That this Court finds that the trial Magistrate Court lacked jurisdiction to hear and determine 1<sup>st</sup> and 2<sup>nd</sup> Appellants counterclaim and claim as against the 3<sup>rd</sup> to 6<sup>th</sup> Appellants and wholly allow the 3<sup>rd</sup> to 6<sup>th</sup> Appellants application dated 5<sup>th</sup> July, 2022.
- 2) Costs of this appeal and in the lower Court be awarded to the 3<sup>rd</sup> to 6<sup>th</sup> Appellants.
- 3) Such further orders as it may deem just in the circumstances.” (sic)

15. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered. Notably, the 5<sup>th</sup> to 16<sup>th</sup> Respondents did not participate in the instant proceedings.

### Submissions

16. On the part of the Appellants, counsel began his submissions by identifying the undisputed and disputed issues in the appeal and thereafter proceeded to condense his submission into five (5) cogent issues for this Court’s consideration. He further added that what this Court ought to particularly consider while making a finding that a suit is Sub-judice, rests on three (3) conditions namely:- that the matter in issue must also be directly and substantially in issue in the previously instituted suit; that the proceedings must be between the same parties; and that the proceedings must be pending in Court within the jurisdiction of Kenya. Addressing the Court on whether the Appellants were litigating under the same title before the BPRT and lower Court, counsel cited on the provision of Section 6 of the *Civil Procedure Act* and the decision in *Ukay Estate Ltd & Another v Shah Hirji Manek Ltd [2006] eKLR* to summarily argue that the learned Magistrate failed to properly identify the subject matter hence her wrong conclusion on multiple suits as there was no duplicity of suits on the same subject matter. On whether the BPRT suit and lower Court suit were between the same parties it was posited that the trial Court’s finding was based on assumptions as opposed to factual basis given that the 1<sup>st</sup> Respondent was the only party enjoined to the BPRT proceedings meanwhile the latter did not conclusively address itself on the issue of joinder whereas no ruling or order was placed before the lower Court to lead it to conclude that the 1<sup>st</sup> to 4<sup>th</sup> Respondent had been enjoined as Interested Parties.

17. Submitting on whether the Interested Parties as parties to a suit, counsel relied on the decisions of the Supreme Court in *Methodist Church in Kenya v Mohamed Fugicha & 3 Others [2019] eKLR* and *Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016] eKLR* to contend that an Interested Party only has an interest in a matter however cannot be seen to frame its own fresh issues or to introduce new issues for determination before the Court. Therefore, the trial Court erred in arriving at the conclusion that the 2<sup>nd</sup> to 4<sup>th</sup> Respondent has been enjoined to the proceedings before the BPRT whereas joinder of the 1<sup>st</sup> Respondent did not make him a primary party and or change the cause of action before the BPRT. Concerning whether the Appellants could levy distress for rent that had not been due before distress, it was submitted that distress for rent is a right at common law which arises when obligation to pay rent arises and is in arrears therefore the Appellants could not levy distress in advance so as to pre-litigate in the BPRT so as to avoid filing the lower Court suit. The provisions of



Section 3 of the *Distress for Rent Act*, the decisions in *Peter Nthenge v Daniel Itumo & Another* [1976] eKLR and *John Nthumbi Kamwizhi v Asha Akumu Juma* [2018] eKLR were cited in the foretated regard. As to whether the Appellants could levy distress after they had terminated the landlord-tenant relationship, counsel placed reliance on the decision in *Republic v Chief Magistrate, Kibera & 2 Others Ex Parte James Kiragu* [2012] eKLR to summarily argue that once the landlord-tenant relationship ceases to exist, the former landlords could no longer levy distress for rent. Lastly, on whether upon the termination of the landlord-tenant relationship, the same ousted jurisdiction from the BPRT, counsel relied on the decision from the BPRT in *Hurlingham Grocer Limited v APA Insurance Limited* [2021] eKLR to submit that once the suit property was transferred to the 9<sup>th</sup> Respondent the landlord-tenant relationship between the Appellants and 5<sup>th</sup> – 16<sup>th</sup> Respondents axiomatically ceased consequently spending the matter before the BPRT. The Court was thus urged to allow the appeal as lodged.

18. On the part of the 1<sup>st</sup> to 4<sup>th</sup> Respondent, responding to the Appellants submissions as pertains the question of Sub-judice, counsel contended that it is manifestly clear from the Appellants counterclaim that they admittedly instituted distress proceedings to claim rent arrears from the 5<sup>th</sup> -16<sup>th</sup> Respondent in the BPRT, which matter is still pending before the said Court meanwhile proceeded to simultaneously institute proceedings before the lower Court. On whether the matter before the lower Court was directly and substantially in issue in the BPRT, it was submitted that the matter and issue both before the lower Court and BPRT related to distress for rent therefore the trial Court did not err in the arriving at the decision it did. As concern the question whether the previous proceedings before the BPRT were between the same parties, counsel argued that the Plaintiff's before the lower Court were equally parties before the tribunal whereas the cause of action before the tribunal and the Appellants Counter-claim before the lower Court were similar.
19. Counsel further submitted that the issues concerning levying of distress and termination of the landlord-tenancy relationship were issues not canvassed before the trial Court however went on to contend that the Appellants are conflating issues before this Court given that their right to rent is a question rightly within the jurisdiction of the BPRT and the latter has first instant to address such questions. Counsel went on to posit that the transfer of the suit property to the 9<sup>th</sup> Respondent equally did not ouster the BPRT's jurisdiction to adjudicate on the matter before it given that the same was filed before change of ownership had been effected. While calling to aid the decision in *Law Society of Kenya v Attorney General & Another* [2019] eKLR, counsel asserted that notwithstanding the transfer of ownership the tenants to the suit premises had a legitimate expectation that the cause before the BPRT would be heard and determined to its logical conclusion. It was further argued that any questions as pertains jurisdiction of the BPRT ought to have been canvassed before the tribunal therefore this Court ought to frown upon the Appellants subtle invitation to address the same through this appeal. The decision *Re Hebtulla Properties Ltd* [1979] KLR 96 [1976-80] 1 KLR 1195 as cited in *Republic v Business Premises Rent Tribunal & Another, Ex Parte Albert Kigera Karume* [2015] eKLR was relied on in the latter regard. In summation counsel urged the Court to dismiss the Appellants appeal and allow the Cross appeal with costs. Analysis

### **Disposition And Determination**

20. The Court has considered the record of appeal, the pleadings before the lower Court as well as the submissions by the respective parties. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2 EA 212; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.



21. However, before proceeding any further it would be remiss if this Court were not to address an issue that would necessitate good order in respect of the appeals before this Court. As earlier noted, the 1<sup>st</sup> - 4<sup>th</sup> Respondent's being equally aggrieved by the impugned decision of the lower Court presented a Cross-Appeal. When parties appeared before the Deputy Registrar (DR) on 25<sup>th</sup> April, 2023 for purposes of directions on the Appellants appeal, counsel appearing for the Appellants drew the Court's attention to the fact that the 1<sup>st</sup> - 4<sup>th</sup> Respondents Cross-Appeal had been filed out of time, a fact equally acceded to by counsel appearing on behalf of the 1<sup>st</sup> - 4<sup>th</sup> Respondents.
22. To the foretated end, counsel for the latter sought leave and undertook to file the motion for leave to file their Cross-Appeal out of time, within three (3) days. A thorough examination of the record reveals that no such application for leave to file the Cross-Appeal out of time was filed and or directions on the same issued. It is trite that competency of an appeal goes to the jurisdiction Court to entertain the said appeal. Consequently, an appeal filed out of time without the requisite leave is an incompetent appeal to which an appellate Court lacks the requisite jurisdiction to entertain. See Nyarangi. JA's rendition in the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. In the light of the foretated, the 1<sup>st</sup> - 4<sup>th</sup> Respondent's Cross-Appeal is consequently struck out for want of competency.
23. Moving on to the substratum of the appeal, the 1<sup>st</sup> - 4<sup>th</sup> Respondent's motion before the lower Court was expressed to be brought inter alia pursuant to Section 1A, 1B, 3A, 6 and 7 of the CPA & Order 2 Rule 15 of the CPR. The trial Court in allowing the 1<sup>st</sup> - 4<sup>th</sup> Respondent's motion stated in part that; -

"I have carefully considered the application, its supporting affidavit, supplementary affidavit and the replying affidavit filed in response. The issues for determination are as follows:

- i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant's claim as against the 3<sup>rd</sup> and 6<sup>th</sup> defendant is Res Judicata?
- ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant's counterclaim against the plaintiffs and claim as against the 3<sup>rd</sup> to 6<sup>th</sup> defendant is sub judice?
- iii. Who will bear the costs of the application?
  - i. ....
- iv. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant's claim as against the 3<sup>rd</sup> and 6<sup>th</sup> defendant is Res Judicata?
  - i. ....
- v. ....I find that the counterclaim against the Plaintiffs and the claim against the 3<sup>rd</sup> to 6<sup>th</sup> Defendants is not Res Judicata Kiambu High Court Succession Cause No. 104 of 2017.
- vi. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendant's counterclaim against the plaintiffs and claim as against the 3<sup>rd</sup> to 6<sup>th</sup> defendant is sub judice?

Section 6 of the [Civil Procedure Act](#) provides that

"No Court shall....."

The rationale for this provision is the avoidance of multiple suits on the same subject matter between the same parties.



.... I note that the parties in Business Premises Rent Tribunal Case No. 103 of 2020 are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who have been sued by the Plaintiffs. From the ruling annexed to the supporting affidavit and marked KWT-9, it is evident that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant herein who are the subject of the claim against the co-defendants in the present suit are also parties to Nairobi Business Premises Rent Tribunal Case No. 103 of 2020.....having been enjoined via an application dated 26<sup>th</sup> August, 2020. The issue in dispute is the non-payment of rent by the plaintiffs against whom the 1<sup>st</sup> and 2<sup>nd</sup> defendant sought to levy distress. It is not in dispute given the submissions filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendant that..... Tribunal Case No. 103 of 2020..... was still pending as it had not been prosecuted or withdrawn by the Plaintiffs. In the circumstances, I find that the counterclaim and claims against co-defendants dated 12<sup>th</sup> October, 2021 was sub-judice..... Tribunal Case No. 103 of 2020..... Having found so and as.....Tribunal Case No. 103 of 2020.....was filed before the present suit, I have considered where this case should be stayed or struck out. I find guidance in the case of Rubis Energy Kenya PLC v SAS Africa General Trading Limited & 2 Others [2021] eKLR, .....

Consequently, having found that the 1<sup>st</sup> and 2<sup>nd</sup> defendant's counterclaim and the claim against co-defendants in sub-judice..... Tribunal Case No. 103 of 2020....., I proceed to strike out the same with each party bearing their own costs." (sic)

24. The salient provisions invoked in 1<sup>st</sup> - 4<sup>th</sup> Respondent's motion include Section 1A, 1B, 3A, 6 and 7 of the CPA. However, as can be garnered from the impugned decision and submissions by the parties before this Court, of relevance to the instant appeal is Section 6 the CPA, which 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.

25. Notably, the doctrine of Sub-judice as encompassed in Section 6 of the CPA was considered by the Supreme Court in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR as follows: -

“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.” [emphasis mine]



26. Further, good order and logic dictates that the process of administration of justice would be hampered if a Court were to allow the same parties to bring a multiplicity of suits over the same dispute. To the foregoing end, the Court of Appeal in *Barclays Bank of Kenya Limited v Elizabeth Agidza and 2 others* [2012] eKLR observed that; -

“The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the *Civil Procedure Act* were that there is constraint on judicial time and therefore a lot of pressure on the courts to expedite resolution of Civil disputes ....., if a substantial part of the matters in issue or controversy in the subsequent suit is covered by the previous suit, Section 6 should be involved to save the precious judicial resources”.

27. With the foregoing in reserve, what falls to be determined on this appeal is whether the trial Court properly exercised its discretion and or misdirected itself and as a result arrived at a wrong decision by allowing the 1<sup>st</sup> – 4<sup>th</sup> Respondent’s motion before it. The key sticking point before the trial Court touched upon whether the Appellant’s Counter-claim was Res-Judicata? At this juncture it would be pertinent to contextualize the issues without digressing from the substratum of the appeal herein. Upon review of the Appellant’s Counter-claim; the 1<sup>st</sup> – 4<sup>th</sup> Respondent’s motion and affidavits in support thereof; affidavit in response thereto; and submission before the trial Court, it is obvious that the events leading hereto have since been heavily litigated upon. That said, what can be gathered from the forestated material is that at the heart of the dispute was rental income in respect of the suit property, wherein the latter among other assets or properties (belonging to the Deceased), were the subject succession in Kiambu High Court Succession Cause No. 104 of 2017 (hereinafter the succession cause).

28. On 5<sup>th</sup> March, 2020, the High Court in Kiambu Succession Cause No. 104 of 2017 confirmed the grant in respect the Deceased’s estate wherein as a result of the said confirmation, the Court ordered the suit property be sold and proceeds thereof be shared among the beneficiaries of the estate of the Deceased. Particularly, between the Appellants, the 1<sup>st</sup> to 3<sup>rd</sup> Respondent, among others. (see “Annexure KWT3b”). It further appears that at all material times relevant to the proceedings before the Succession Court, the 5<sup>th</sup> to 16<sup>th</sup> Respondents were tenants of the suit property while the Appellants and 1<sup>st</sup> Respondent were joint administrators of the Deceased’s estate. (see “Annexure KWT3a”). It is on the premise of the forestated that in 2021 the 5<sup>th</sup> to 16<sup>th</sup> Respondents filed the lower Court suit as against the Appellants and 1<sup>st</sup> to 4<sup>th</sup> Respondent (see “Annexure KWT2”). In defence the Appellants filed a joint statement of defence and counterclaim denying the key averments in the Complaint meanwhile sought judgment in the sum of Kshs. 1,036,000/- (purportedly half of their share of rental proceeds from the suit premises) as against the 1<sup>st</sup> to 4<sup>th</sup> Respondents and costs of the counterclaim. The latter was premised on the fact that 1<sup>st</sup> Respondent though being a Co-administrator of the Deceased’s estate ostensibly intermeddled with the same in collusion with the 2<sup>nd</sup> to 4<sup>th</sup> Respondent to collect and utilize the rental income from the suit premises as opposed to working with the Appellants who were Co-administrators.

29. Preceding the filing of the lower Court suit and orders of the succession Court issued on 5<sup>th</sup> March, 2020, it appears that in January of the same year, the 5<sup>th</sup> to 16<sup>th</sup> Respondent moved the BPRT vide a reference application seeking injunctive reliefs as against the Appellants and or their agents from harassing them or distressing for rent in respect of the suit property/premises. (see “Annexure



KWT8b”). On 12<sup>th</sup> June, 2021 the BPRT delivered its decision in respect of the reference-motion wherein its stated in part that; -

“ 3. There are several applications before this tribunal, I will highlight a few that have an impact on my orders hereto, the application dated 1<sup>st</sup> July 2021 was for extension of interim orders which is spent upon delivery of this ruling. Another application dated 25<sup>th</sup> May, 2021 enjoins the new owner Elijah Mburu Mbugo who never participated in this proceedings. There exists interim relief as against the new owners from interfering with the tenants quite possession

.....

38. The premises have since exchanged hands as at the 1<sup>st</sup> June 2021, the same was sold and one Elijah Mburu Mbugo became the new owner

39. Upshot of this findings lead me to order as follows: -

- i. The Respondents and Elijah Mburu Mbugo are restrained from distressing for any rent before the sale of the property being from the 1<sup>st</sup> June, 2021.
- ii. Tenant to pay rent on due dates to Elijah Mburu Mbugo and in default leave is granted for distress of rent arrears accruing from the 1<sup>st</sup> June, 2021.
- iii. Reference dated 28<sup>th</sup> January 2020 between the Tenants and Esther Njeri, Eunice Mwaria on one hand and George Mbuthia Thumbi, Peter Muigai Thumbi and Karen Thumbi as enjoined via application dated 26<sup>th</sup> August 2020 on the other hand be fixed for hearing within 90 days” (sic)

30. It would be important to note that the reference application as filed by the 5<sup>th</sup> to 16<sup>th</sup> Respondent, and others, captured the Appellants and Galaxy Auctioneers, as the Respondent to the said motion, whereas the decision by the BPRT captured the latter and the 1<sup>st</sup> to 3<sup>rd</sup> Respondent in the instant appeal, as 1<sup>st</sup> Interested Parties, with the 9<sup>th</sup> Respondent in the instant appeal appearing as the 2<sup>nd</sup> Interest Party. The relevance of the forestated will become apparent later in this judgment.

31. That said, the Appellants Counter-claim was in respect of proceeds of rental income in respect of the suit property that were purportedly received by the 1<sup>st</sup> to 4<sup>th</sup> Respondent between October 2020 and May 2021. Further, in light of the succession cause, at all material times relevant to the Deceased’s estate the Appellants and the 1<sup>st</sup> Respondent were Co-administrators to the estate meanwhile in the reference motion before the BPRT, the deponent to the affidavit in support (the 6<sup>th</sup> Respondent) admits to the fact that he did not know Appellants whereas to the best of his knowledge the landlords to the suit property to whom they paid rent to since 2013 were 1<sup>st</sup> to 3<sup>rd</sup> Respondent. (see “Annexure KWT8b”). The latter evidently contrary to the fact the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent were not administrators of the Deceased’s estate in the said regard and were thus not entitled administer and or utilize the proceeds prior to confirmation of the grant on 5<sup>th</sup> March, 2020, upon which they were listed as beneficiaries to the proceeds of sale in respect of the suit property.

32. As observed in Kenya National Commission on Human Rights (supra), the test on whether a matter is Sub-judice is four (4) pronged: there has to be more than one suit over the same subject matter; that



one of the suit's 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. The Court's reasoned deduction is that the test is conjunctive wherein all four ingredients must be met for a matter to be thus construed to run afoul of the doctrine of Sub-judice. From the gathered set of facts earlier recapitulated, it can be observed from the affidavit material relied on by the respective parties before the lower Court, that the subject matter in the Appellants Counter-claim and the dispute before the BPRT were divergent notwithstanding the fact that both claims somewhat gyrated around the proceeds on rental income in respect of the suit premises.

33. Indubitably, the lower Court suit and the reference before BPRT concerned different subject matters wherein the former, was a suit between Co-administrator in respect of a cause of action which appears to be premised on alleged intermeddling and the latter being in respect of injunctive reliefs on distress for rent as against Appellants, as administrators, over the suit property. The 1<sup>st</sup> to 4<sup>th</sup> Respondents contestation that the matter and issue both before the lower Court and BPRT related to distress for rent cannot sustain.
34. Meanwhile, the trial Court was in error to find that the suit before it was Sub-judice on grounds that the matter before it appertained similar parties without interrogation of the crux of the dispute before the respective competent Courts. Consequently, the Court believes it has reasonably addressed itself to the matter that the Appellants Counterclaim was not Sub-judice. As to the merits or demerits of the Appellants Counterclaim and whether the same is appropriately before the said Court, the same ought to be canvassed before the said forum. In the result, the appeal is merited and justice in the matter lies in setting aside the ruling of the lower Court with each party bearing their own costs in light of the dispute being between family members.

#### **Determination**

- i. This Appeal is allowed.
- ii. The Ruling of the lower Court dated 16<sup>th</sup> September 2022 is hereby set aside.
- iii. The Appellants' Counterclaim is hereby struck out.
- iv. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2024**

**HON. T. W. Ouya**

**JUDGE**

Ms Kisotu holding brief for Mr. Makumi for the Appellants

Firm of MK Mukunyi on record for Respondent

COURT ASSISTANT MARTIN KORIR

ROA 14 days.

