



REPUBLIC OF KENYA



Muchiri t/a Fancy Auctioneers & another v Thungutha & another (Environment and Land Appeal E058 of 2025) [2025] KEELC 4839 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E058 OF 2025**

**JG KEMEI, J
JUNE 26, 2025**

BETWEEN

**GEORGE GITONGA MUCHIRI T/A FANCY AUCTIONEERS .. 1ST APPELLANT
REAL DEVELOPMENT COMPANY LIMITED 2ND APPELLANT**

AND

**IGNATIUS MURAGE THUNGUTHA 1ST RESPONDENT
MARY WAITHERA GIKONYO 2ND RESPONDENT**

(In respect of the 2ND Respondent's Preliminary Objection dated 27/03/2025)

RULING

1. This Ruling is in respect to the 2nd Respondent's Preliminary Objection dated 27/03/2025. To contextualize the Objection, it is imperative to give a brief history of the dispute.
2. From the records, the 1st Appellant, having been instructed by the 2nd Appellant/Landlord, moved the Subordinate Court vide the application dated 20/3/2024 seeking orders of security from the Police Officers to enable him break-in and remove all proclaimed goods or any other attached goods belonging to the Tenant, the 1st Respondent herein, so as to recover rent arrears in the sum of Kshs. 4,550, 000/= . The application was premised on the grounds that the Tenant, the 1st Respondent herein had defaulted in payment of the rent hence the need for distress for rent. That the proclamation of goods was done but the Tenant, was denying them access to the premises hence frustrating the attachment. The Appellant adduced a Lease Agreement dated 1/11/2022 between the 2nd Appellant and the 1st Respondent herein.
3. On 22/4/2024, the Court granted the Auctioneer orders to break-in and remove proclaimed goods and issue a notification of sale. The orders were however not to be used for eviction or demolition. The orders were issued on 25/4/2024.



4. Vide the application dated 7/6/2024, the 2nd Respondent moved the Lower Court seeking to be joined as an interested party in the proceedings, stay of execution of the orders issued on 25/4/2024, a review and/or setting aside of the said orders among other orders. The 2nd Respondent averred that the 1st Appellant and the 1st Respondent had colluded and forcefully evicted her together with her children from the suit premises using the said orders. She further alleged that they had carted away her household items and locked her out of the premises.
5. She further averred that the 1st Respondent is her ex-husband having dissolved their marriage on 31/5/2024. She argued that the suit property is Matrimonial Property and that they had never remitted any rent to the 2nd Appellant/Landlord. She stated that the suit property is subject of Matrimonial Property proceedings before the High Court Matrimonial Cause E008 of 2024 seeking division of the subject property. She averred that the said proceedings are still pending before the High Court.
6. Upon hearing the application, the Learned Magistrate, Hon. Lucy Ambasi delivered her Ruling on 20/3/2025 in which she allowed joinder of the 2nd Respondent herein as an interested party and stayed execution of the orders issued on 25/4/2024. She further granted a review and or varied the orders of 25/4/2025 in view of the fact that the orders had been used to evict the applicant contrary to the express orders of the Court. The Court further directed the Appellants to reopen the premises and grant the 2nd Respondent herein unrestricted access thereon. The orders were issued on 21/3/2025.
7. In her Ruling, the Learned Magistrate held that the matter before her did not raise the question of matrimonial rights over the subject property. The Court stated that it was not in any way determining the matrimonial rights of the parties to ownership of the property but rather the application before her was for distress for rent.
8. The Appellants being aggrieved by the Ruling and Orders issued by Hon. Lucy Ambasi on 21/03/2025 in Milimani Civil Misc. Application No. E598 of 2024 preferred an appeal against the entire Ruling vide the Memorandum of Appeal dated 21/03/2025. Alongside the appeal, the Appellants filed a Notice of Motion application of even date principally seeking stay of execution of the orders issued in Lower Court.
9. Upon service, the 2nd Respondent, Mary Waithera Gikonyo, filed a Replying Affidavit and a Preliminary Objection both dated 27/03/2025. It is the said Preliminary Objection that is subject of this Ruling.
10. The Preliminary Objection is in respect to both the Appeal and the application dated 21/03/2025. The 2nd Respondent seeks that the application and the appeal be struck out with costs on the grounds that;
 - a. This Honourable Court lacks jurisdiction to entertain the present suit, as the subject matter is matrimonial property, which is exclusively governed by the *Matrimonial Property Act*, 2013 and falls within the jurisdiction of the Matrimonial Court. It is well settled that jurisdiction is a fundamental issue that goes to the root of the Court's authority, and where a Court lacks jurisdiction, it must down its tools, as held in Owners of Motor Vessel "Lilian S" –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1. The 2nd Respondent submits that this Honourable Court lacks the jurisdiction to hear and determine the matter and should strike out the suit with costs to the 2nd Respondent.
 - b. That the Appellants have filed a further Affidavit without seeking leave of Court as is required in Order 51 Rule 14 (3) of the Civil Procedure Rules and have adduced new evidence in the further affidavit that was not presented before the trial Court without first seeking leave of Court which is a violation of Order 42, rule 27 of the Civil Procedure Rules.



- c. The Appellants have filed an appeal on a matter that is already pending hearing and determination in a Court of competent jurisdiction. This offends the clear provisions of Section 6 of the *Civil Procedure Act*, Cap 21 laws of Kenya as the matter in issue is also directly and substantially in issue before a Court of competent jurisdiction vide Matrimonial Cause No. E 008 OF 2024 in the High Court at Milimani.
11. The Court directed on the 4/4/2025 that the Preliminary Objection be canvassed by way of written submissions. The 2nd Respondent/ Objector complied and filed her submissions dated 27/03/2025. The appellants filed written submissions on 2/4/25. I have read and considered the said submissions.

The 2nd Respondent/ Objector's Submissions

12. The Objector raises 3 main issues for determination. The first issue is whether this Honourable Court has jurisdiction to determine disputes relating to matrimonial property. The 2nd Respondent submits that the jurisdiction of this Court is limited to matters relating to land, the environment and related disputes under Article 162(2) (b) of *the Constitution* and the *Environment and Land Court Act*. The Objector cites the Supreme Court decision in Republic –vs- Karisa Chengo & 2 Others (2017) eKLR, where the Court emphasized that the specialized Courts established under Article 162 (2) of *the Constitution* have limited jurisdiction to their specific mandates and cannot handle matters outside their purview.
13. She argues that the *Matrimonial Property Act*, 2013, governs disputes over matrimonial property, does not confer jurisdiction upon the ELC. Instead, jurisdiction is vested in Matrimonial Court. Therefore, this Court lacks jurisdiction and must down its tools as stated in the celebrated case of Owners of the Motor Vessel “Lilian S” v. Caltex Oil (Kenya) Ltd (1989) KLR 1.
14. The second issue identified by the 2nd Respondent is whether the suit is sub judice in light of the pending suit concerning the same subject matter. The Objector avers that the doctrine of sub judice under Section 6 of the *Civil Procedure Act*, prohibits Courts from proceeding with a matter that is directly and substantially in issue in a Court of competent jurisdiction. She submits that since there is an ongoing suit in the Matrimonial Court over the same property involving the same parties, proceeding with this suit would be a violation of the sub judice rule.
15. The other issue is whether the Appellants can introduce new evidence that was not presented in the trial Court. The Objector avers that the Applicants have filed a further affidavit which adduces new evidence that was not presented before the trial Court without seeking leave of Court. That this in contravention of the provisions in Order 42 Rule 27 of the Civil Procedure Rules.

The Appellants Submissions

16. The appellants submitted that for the Court to arrive at a finding as to whether or not the Court has no jurisdiction to hear and determine the matter and or whether the present appeal is sub judice, the Court has to ascertain facts thereby ousting the objection from being a pure point of law. To that end the appellants argued that the provisions of Order 42 Rule 27 of the Civil Procedure Rules applies on appeal. That the issues raised in the objection are incapable of disposing the suit.
17. Citing the decision of the Court in Mukisa Biscuits Manufacturing Limited Vs West End Distributors (1969) EA the Court was urged to find that a preliminary objection consist of a pure point of law that if argued may dispose of the suit, it 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 an exercise of



judicial discretion. The Court was further urged to find that there is no crisp and settled point of law raised in the objection and the Court ought to dismiss the same with costs.

Analysis and Determination

18. I have considered the Notice of Preliminary Objection by the Respondents and the rival submissions, I am of the considered view that the Preliminary Objection raises two broad limbs. The issues for determination are:
- a) Whether this Court has jurisdiction to determine the Appeal
 - b) Whether this suit is sub judice
 - c) Whether the preliminary objection is merited.

A. Whether this Court has Jurisdiction to Determine the Appeal

19. The starting point is to define what a preliminary objection is. On what constitutes a Preliminary Objection, in the case of Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 others Supreme Court Kenya Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A where the Court of Appeal said that:

“...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 need to be ascertained or if what is sought is the exercise of judicial discretion.”

20. Prior to determining a question raised as a Preliminary point, the Court is required to first satisfy itself that the issue raises a pure point of law.
21. The 2nd Respondent’s Preliminary first ground of objection is that this Honourable Court lacks jurisdiction to hear and determine the dispute. I find that the issue raises a pure point of law which if successful, may determine the suit.
22. It has been said that jurisdiction is everything and without it, a Court has no power to make any step. This was stated in the classic case of The Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1. Where Nyarangi J.A. held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



23. In determining the issue of jurisdiction, the Supreme Court in the case of Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & 2 others held as follows:

“..... a Court can only exercise jurisdiction that has been donated to it by either the constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

24. The broad jurisdiction of the Environment and Land Court is donated by Article 162(2) of the Constitution of Kenya which provides that;

“Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to-

(b) the environment and the use and occupation of, and title to, land.”

25. Section 13 (2) of the Environment and Land Court Act No.19 of 2011 outlines the disputes which this Court has powers to hear and determine, and subsection 4 further confers this Court with the appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

26. The dispute herein involves a parcel of land Reference Number 10199/10 Karen which has been claimed to be matrimonial property. The Objector contends that the suit property being matrimonial property, then it is the High Court which should hear and determine the dispute. That this Court lacks the jurisdiction to hear and determine the dispute.

27. Jurisdiction to determine matrimonial property disputes is enshrined under Section 17 of the Matrimonial Property Act, 2013 which provides that: -

“(1) A person may apply to a Court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1) —

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

28. Hon. Justice Nyamweya (as she then was) in Jane Wambui Ngeru –vs- Timothy Mwangi Ngeru [2015] eKLR noted that –

“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the Courts that will hear matrimonial causes arising under the Act are resident magistrate’s Courts and within the limits provided under the law as to their jurisdiction”.

It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only



limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”

This Court therefore adopts a similar position and finds that it has the Jurisdiction to adjudicate this matter as the same relates or involves land, and therefore the defendant’s submissions in this regard has no basis.”

29. As correctly noted by the Learned Magistrate, the dispute before the Lower Court was for distress for rent. It was not for determination on the question of matrimonial property. The dispute was between the Appellants and the 1st Respondent who were primary parties. The 1st and 2nd Respondent’s dispute as to whether the suit property is a matrimonial property was not a question for determination before the Lower Court. In any event, both the 1st and 2nd Respondent aver that the dispute on matrimonial property is rightfully pending before the High Court.

30. I also noted that the 2nd Respondent/Objector sought to be joined as an Interested Party, which prayer was granted. Black’s Law Dictionary defines an Interested Party as “a party who has a recognizable stake (and therefore standing) in the matter.”

31. In the case of SOCAF & Company Limited -vs- John Maina Njoroge & 5 Others; Francis Ngau Musyoki (Interested Party) [2022] eKLR the Learned Judge cited the case of Francis K. Muruatetu and Another vs. Republic & 5 Others (2016) eKLR, where the apex Court pronounced itself on the extent to which an Interested Party may participate in the proceedings as follows;

“any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether new issue to be introduced before the Court.”

32. Based on the foregoing decision by the apex Court, an Interested Party is bound by the issues as framed from the pleadings of the primary party. In the instant case, the dispute is between the Appellants and the 1st Respondent for rent arrears and not a matrimonial dispute. The 2nd Respondent being an interested party cannot introduce a new cause of action between the primary parties.

33. It is therefore my finding that this Court has jurisdiction to hear and determine the instant appeal and application. The first limb of the Objection is therefore not merited.



B. Whether this Suit is Sub Judice.

34. 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.”

35. I find that in order to determine whether the rule of sub judice has been offended, the Court has to delve into material facts of the case pending in the High Court, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar. This necessarily puts the matter outside the ambit of a Preliminary Objection.

36. I agree with the decision in *Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another* (2014) eKLR, where the Court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

37. I am further persuaded by the Court’s holding in the case of *Margaret Wachu Karuri –vs- John Waweru Ribiro* (2021) eKLR, the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this Court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

38. It is my finding that to determine whether the appeal is sub judice to the suit and the issues raised in High Court Matrimonial Cause E008 of 2024 can and/or will be better ventilated through a normal Application to the Court. The Court needs more information than what is currently provided to enable it make a proper determination as regards the issue of sub-judice. The issue of sub-judice cannot be determined by way of the Preliminary Objection for reasons explained above.

39. It is also important to note that a party aggrieved by an order or decree of the Court has a right to lodge an appeal before a Superior Court as provided in law. An appeal cannot be filed in an already existing suit. The Appellants could not file an appeal in the pending suit before the High Court as they are not parties therein.

C. Whether the preliminary objection is merited

40. The other limb of the 2nd Respondent’s objection is that the Appellants have filed a further Affidavit without seeking leave of Court as is required in Order 51 Rule 14 (3) of the Civil Procedure Rules



and have adduced new evidence in the further affidavit that was not presented before the trial Court without first seeking leave of Court which is a violation of Order 42, rule 27 of the Civil Procedure Rules. Clearly, this is not a pure point of law that can dispose of the suit if merited.

41. Filing of documents without leave of Court invites the Court to exercise its discretion and either expunge the impugned document or admit the document in the interest of justice. Therefore, the 2nd Respondent can only raise such an objection through an application for the Court's determination.
42. Final Orders for Disposal
 - a. From the foregoing, it is my finding that the Notice of Preliminary Objection dated 30/11/2023 has no merit.
 - b. I therefore dismiss it with costs to the appellants.
43. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2025
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered Online in the Presence of;

1. N/A for the 1st and 2nd Appellants
2. N/A for the 1st Respondent
3. Mr. Swaka for the 2nd Respondent
4. C/A – Ms. Yvette Njoroge

