



**Mureithi v Ngure (Civil Appeal E1452 of 2023)
[2025] KEHC 15204 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E1452 OF 2023
WM MUSYOKA, J
OCTOBER 23, 2025**

BETWEEN

MARY ELIZABETH MUREITHI APPELLANT

AND

ANTONY MURIMI NGURE RESPONDENT

(Appeal from judgement and decree, of Hon. TK Nambisia, Resident Magistrate, RM, delivered and passed on 24th November, 2023 in Nairobi SCCCOMM E. 8335 of 2023)

JUDGMENT

1. The appeal herein arises from a decision made on 24th November 2023, on a preliminary objection, based on a point of law.
2. The appellant had sued the respondent, at the primary court, the Small Claims Court, claiming Kshs. 431,000.00, as unpaid rent. The respondent, in response, filed a notice of preliminary objection, dated 7th November 2023, arguing that the said suit was res judicata SCCCOMM/E29/2022, between the same parties, where a judgement had been delivered on 14th April 2022. It was argued that the new suit was a disguised appeal on the decision in the earlier suit, yet the trial court had become functus officio. In the ruling, of 24th November 2023, the trial court upheld the grounds that the issues raised in the new matter had been determined in the earlier suit.
3. The judgement, in Nairobi SCCCOM No. E529 of 2022, is in the record before me. That suit was between the same parties, and was founded on the same facts. The matter was struck out, in the Judgment of 28th April 2022, not on its merits, but on a technicality of the law, the fact that the appellant herein did not have legal capacity to initiate the suit, as that capacity could only be gotten upon his appointment as personal representative of the deceased.
4. There are several issues.



5. The first is that the earlier suit was not dismissed, but struck out. The 2 are different. Dismissal is on the merits, striking out is not. A matter will be struck out where it is technically inferior, either as it discloses no cause of action, or it is incompetent for want of jurisdiction, or it is filed in abuse of court process, or such like. If it is technically deficient, it would be open to striking out, due to that deficiency. It is struck out, without its merits being considered.
6. The striking out of a court case does not bar the filing of another suit against the same defendant, and on the same facts, as the merits of the case would not have been considered, in the earlier or former suit, which was struck out, and the latter suit would not fall afoul of the res judicata rule. The res judicata rule only applies to cases where the earlier suit falls on account of its lack of merit, rather than on a technicality.
7. Dismissal of a suit is usually on merits, not a technicality. A dismissal, since it is on merits, bars the re-filing of the suit, on the same facts, and against the same parties. Such a re-filing would be against the res judicata and functus officio rules.
8. What the appellant did, in this case, was to address the technical fault in her earlier suit, the fact of lack of a grant of letters of administration, to clothe her with the requisite locus to sue, on behalf of the owner of the property in question. She went to the probate court, obtained a grant of representation, to the estate of the deceased person, the registered proprietor of the property, in respect of which the respondent was said not to have paid rent.
9. The new suit was not barred by the res judicata principle. The issues it raises were the same as in the earlier suit, but the trial court, in the earlier suit, had not determined those issues. It never got to the stage of determining them, for it struck out the earlier suit, on a technicality. It did not go into the merits of that earlier case at all. That meant that there was no bar, on account of res judicata, to a fresh suit being mounted, on the same facts, for the technical flaws, which defeated the earlier suit, have been addressed.
10. The trial court did not consider the ratio decidendi in *The Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 others* [2017] eKLR [2017] KECA 477 (KLR) (Makhandia, Ouko, Kiage, M’Inoti & Murgor, JJA), the case it relied on, particularly paragraph(d) of the principles laid out there, which read “the issue was heard and fully determined in the fresh suit.” The issue of the unpaid rent was not determined in the earlier suit. The trial court, in that earlier suit, merely ruled that the suit was bad for lack of locus standi.
11. There is merit in the instant appeal. I hereby allow it. With costs.
12. This is a Small Claims Court matter. It was filed on 26th October 2023. Under section 34(1) of the *Small Claims Court Act*, Cap 10A, Laws of Kenya, the Small Claims Court has only a 60-day mandate, or jurisdiction, to hear and determine the matters filed in that court, counted from the date of filing.
13. In this case, that mandate expired on 26th December 2023. Beyond that date, the Small Claims Court has no jurisdiction to entertain the suit. The ruling, of 24th November 2023, was delivered within mandate, and was valid. However, after 26th December 2023, the Small Claims Court lost jurisdiction, and it cannot dispose of the matter, following the order that I have made above, allowing the appeal. It cannot hear and determine the matter, in Nairobi SCCCOM No. E529 of 2022, after that date.
14. The suit itself, in Nairobi SCCCOM No. E529 of 2022, has not become void or incompetent. If it was filed within the applicable statutory limitations, it would still be viable, and available for disposal by other competent courts, that is apart from the Small Claims Court, such as the Magistrate’s Court and the High Court.



15. What I shall do, in the circumstances, is to exercise supervisory jurisdiction, under Article 165(5) of *the Constitution*, and order transfer of Nairobi SCCCOM No. E529 of 2022, under section 18 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, to the Chief Magistrate’s Court, at Milimani Commercial Courts, for hearing and final disposal. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 23rd DAY OF OCTOBER 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Antony Murimi Ngure, the respondent, in person.

Advocates

Ms. Abalo, instructed by Desmond Kibuna & Company, Advocates for the appellant.

