



**Kifuso v Kishushe Ranching Co-operative Society Limited (Civil Appeal E111 of 2021) [2025] KECA 1868 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1868 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E111 OF 2021**

**AK MURGOR, P NYAMWEYA & GW NGENYE-MACHARIA, JJA**

**NOVEMBER 7, 2025**

**BETWEEN**

**NEWTON KIFUSO ..... APPELLANT**

**AND**

**KISHUSHE RANCHING CO-OPERATIVE SOCIETY LIMITED RESPONDENT**

*(Being an appeal against the Ruling and Order of the Environment and Land Court of Kenya at Mombasa (Yano, J.) delivered on 2nd March 2021 in Mombasa ELC Case No. 134 of 2019)*

**JUDGMENT**

1. The instant appeal is from an interlocutory ruling of the Mombasa Environment and Land Court (the ELC) (Yano, J.) delivered on 2<sup>nd</sup> March 2021, allowing the prayer by Kishushe Ranching Co-operative Society Limited (the respondent herein) for summary judgement against Newton Kifuso (the appellant herein) brought by way of a Notice of Motion application dated 27<sup>th</sup> September 2019.
2. At the heart of the dispute is the ownership of a leasehold interest comprised in L.R. No. 28984 known as Kishushe Ranch (the suit property). The respondent filed a suit by way of a plaint dated 4<sup>th</sup> July 2019 in which it pleaded that it was the registered proprietor of the suit property; and that without good cause, the appellant entered into a portion of the suit property and begun construction of his residence.
3. The respondent contended that it issued a cease and desist notice to the appellant, but the appellant refused to comply with it. The respondent thus prayed for judgement against the appellant as follows:
  - “a. An order that the appellant vacates and/or delivers up possession of the portion of L.R. 28984 in his occupation or any part thereof forthwith.
  - b. An order restraining the appellant permanently whether by himself, servants and/or agents from unlawfully entering or trespassing upon L.R. 28984 or any part or portion thereof.



- c. Damages for trespass.
  - d. Costs.
  - e. Any other or further relief the Honourable Court deemed fit and just to grant”
4. In his statement of defence dated 19<sup>th</sup> August 2019, the appellant denied that the respondent was the owner of the suit property. He averred that it was the respondent’s purported title which had encroached on his parcel of land; that he purchased his portion of land from one Rofas Masumbuko Samba vide a sale agreement dated 29<sup>th</sup> May 2018; that he completed the construction of a house on his portion of the land; that the suit was an abuse of the court process; and that, in any event, there were other suits touching on the same suit property, being Mombasa ELC No. 260 of 2015 and Mombasa ELC Petition No. 26 of 2019.
  5. Thus the appellant prayed that the suit be dismissed with costs.
  6. Contemporaneously with the defence, the appellant filed a Notice of Preliminary Objection dated 19<sup>th</sup> August 2019 in which he sought that the respondent’s suit be struck out with costs on the following grounds, that:
    - “ a. the suit is bad in law as it offends the mandatory provisions of Section 19 (2) of the *Environment and Land Court Act*, Cap 8D;
    - b. the entire suit is bad in law as it violates the mandatory provisions of Section 6 of the *Civil Procedure Act*, Cap 21; and
    - b. the entire suit is an affront to the well - known legal principle of sub-judice owing to the pendency before the Honourable Court of ELC Petition No. 26 of 2019 against the respondent wherein the validity of the respondent’s purported interest over the parcel land known as Land Reference Number 28984 with Title Number CR 65748 and delineated by Land Survey Plan 361167 is directly and substantially in issue.”
  7. The respondent subsequently filed a Notice of Motion dated 27<sup>th</sup> September 2019 seeking orders that the trial court enter summary judgment for vacant possession in its favour against the appellant. In a brief supporting affidavit of Ellistone Mbela, the respondent’s Chairman, deposed on even date, it was stated that the appellant, without lawful permission, entered the suit land and started construction thereon; that the respondent was entitled to the order of vacant possession as sought in the plaint; that there was no defence to the suit in so far as it related to vacant possession; and that, consequently, there were no triable issues which warranted the suit to proceed for trial.
  8. Opposing the application, the appellant filed a replying affidavit dated 26<sup>th</sup> November 2019. He deposed that the respondent’s application was bad in law, legally untenable and made in bad faith since there was a pending preliminary objection that sought the dismissal of the suit with costs that was yet to be determined; that the respondent being a Co- operative Society, all its decisions were to be ratified by its members in an Annual General Meeting; and that, however, in this instance, no resolution had been made ratifying the institution of the court proceedings.
  9. The appellant further deposed that the allocation of the portion of the suit property to the respondent was as a result of an unlawful and illegal survey; that several investigations had been conducted to ascertain the respondent’s ownership of the portion it occupied on the suit property, including a Taskforce that was set up in 2015 by the Minister of Mining and a public inquiry by the Kenya National



Commission of Human Rights on the impact of mining on human rights in Taita Taveta District; that there was an active litigation, being Mombasa ELC Petition No. 26 of 2019 that was instituted by the appellant against the respondent; that there was a court order dated 9<sup>th</sup> October 2015 issued in Mombasa ELC No. 260 of 2015 restricting the respondent from interfering with the appellant's possession of the suit land, and which order was registered in the encumbrance section of the title to the suit property; that the defence raised triable issues, and that the prayer for summary judgement was untenable in the circumstances; and that the Preliminary Objection should have been heard and determined first since it raised points of law.

10. In a supplementary affidavit dated 10<sup>th</sup> December 2019, also sworn by Elistone Mbela, the respondent deposed that the Preliminary Objection was not a bar to the summary judgement being determined first; that the appellant was not a party in Mombasa ELC No. 26 of 2019, neither was the suit a representative one as contemplated under Order 1 rule 8 of the Civil Procedure Rules so as to warrant a resolution of its members in ratifying the filing of the suit; that the appellant had not alleged that he had an allotted plot number relative to the suit property; that the reports by the Ministry of Mining Taskforce and the Kenya National Commission on Human Rights respectively had never been made public; and that mentioning or referring to them was intended to hoodwink the court that there are triable issues.
11. From the record, it appears that the trial Judge proceeded to hear the respondent's application for summary judgment dated 27<sup>th</sup> September 2019 first, and gave directions as to filing of submissions on the application. In his ruling dated and delivered on 2<sup>nd</sup> March 2021, Yano, J. demarcated the sole issue for determination to be whether the application for summary judgment by the respondent was merited. The learned Judge then went on to refer to the applicable principles in such an application. He then held that the application for summary judgment did not in any way curtail a defendant's right to the protection envisaged under Section 19 (2) of the *Environment and Land Court Act* which provides that the court (the ELC) shall not to be bound by the procedure laid down in the *Civil Procedure Act*, and that, in making its determination, it should be guided by the principles of natural justice; that in an application for summary judgment, a court is only enjoined to look at the issues raised therein and then determine whether they should go a full trial; and that this complements enhancement of good administration of justice as contemplated under Sections 1A and 1B of the *Civil Procedure Act*.
12. The learned Judge further held that the principle of sub judice as provided under Section 6 of the *Civil Procedure Act* was not properly invoked since the appellant had not demonstrated that there existed another suit between him and the respondent; and that in any case, the respondent was not a party in either ELC No. 260 of 2014 or ELC Petition No. 26 of 2019.
13. According to the learned Judge, the main issues that required determination were whether the respondent was the registered proprietor of the suit property, and whether the appellant was lawfully in possession and occupation of the same; that the appellant did not dispute being in occupation of the suit property without the respondent's permission; that therefore, there were no triable issues entitling the appellant to defend; and that proceeding with the suit to full trial would unnecessarily take up court's more time.
14. In the end, the respondent's application was allowed, while the appellant was ordered to vacate the suit property and/or deliver up vacant possession thereof within 60 days of the ruling. In default, the respondent was at liberty to evict the appellant from the suit property. The respondent was also granted costs of the application.



15. Aggrieved by the ruling, the appellant filed this appeal which raises 15 grounds of appeal as per the Memorandum of Appeal dated 9<sup>th</sup> November 2021 which we have condensed into four (4) main grounds, being that the learned Judge erred in law and in fact:
  - a. in failing to fully consider the merits of the appellant’s Preliminary Objection on a priority basis over the respondent’s application;
  - b. in finding that the defence had no triable issues meriting a full trial;
  - c. in finding that an application for summary judgement in no way curtails the appellant’s right to a fair hearing; and
  - d. by ordering the appellant to vacate the suit property within 60 days despite the circumstances and nature of the property and the provisions of the [Land Act](#).
16. We heard the appeal on 1<sup>st</sup> April 2025. Learned counsel Mr. Pamba appeared for the appellant while learned counsel Mr. Mwakisha appeared for the respondent. Both counsel entirely relied on their respective parties’ written submissions. Those of the appellant are dated 9<sup>th</sup> December 2024 while the respondent’s are dated 25<sup>th</sup> February 2025.
17. The appellant submitted on three main issues. The first issue relates to which proceedings took precedence, that is, whether it was the respondent’s application for summary judgement or the appellant’s preliminary objection that ought to have been heard first. Reliance was placed on this Court’s cases of Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited (1969) EA 696 and Wavinya Ndeti vs. Independent Electoral & Boundaries Commission (IEBC) & 4 Others (2014) KECA 629 (KLR) for the proposition that where a preliminary objection raises a pure point of law, and if argued, may dispose of the suit entirely, it ought to be dispensed with first; and that, therefore, it was for good order in the circumstances that the preliminary objection should have been heard before the respondent’s motion.
18. The second issue relates to the merit of the Preliminary Objection. The appellant submitted that it disclosed existence of Mombasa ELC Petition No. 26 of 2019 in which the suit property’s title was being impeached. Reliance was placed on the decision of the superior court in Muturi Investments Limited vs. National Bank of Kenya Limited (2006) KEHC (889) (KLR) where the court held that where two actions have a common question of law and fact, in that the documents which will be relied on shall also require similar interpretation from the court then if the other suit is heard separately, would mean that the evidence submitted by the parties will be duplicated in both cases. Placing reliance on the dicta in the Muturi Case (ibid) the appellant submitted that the common question of the validity or otherwise, of the title should be determined in ELC No. 26 of 2019, and that if the title is found to be illegal, null and void, the basis for the present suit will cease to exist.
19. For the proposition that the respondent’s suit was res judicata pursuant to Section 6 of the [Civil Procedure Act](#), the appellant cited the case of Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 others (2012) eKLR where, it was held that “...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the [Civil Procedure Act](#), Section 6 will still apply. This is so because the overriding objective of the [Civil Procedure Act](#) is for expeditious and proportionate resolution of the civil disputes between parties...”
20. The appellant submitted that the plea of res judicata is not in the form in which the suit is framed but in the substance of the suit as was held in Thiba Min. Hydro Co. Ltd vs. Josephat Karu Ndigwa (2013)



eKLR; and that a claim for trespass cannot stand since the issue at hand was with respect to the title of the suit property and boundaries to the respondent's title.

21. The third issue raised by the appellant relates to the draconian nature of a summary judgment. On this, it was submitted that the entry of summary judgment denied the appellant the right to defend the claim made against him. He cited the decisions of this Court in *Shah vs. Padamshi* (1982) eKLR and *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya* (2007) eKLR in which applications for summary judgment were dismissed due to their draconian effect of denying a party a right to be heard on merit, and for the reason that the court ought not to anticipate that a defendant will not succeed in his/her defence; and the decisions in *Isaac Awuondo vs. Surgipharm Limited & Another* (2011) eKLR; *Moi University vs. Vishva Builders Limited* [2010] eKLR; *Lalji t/a Vakkep Building Contractors vs. Carousel Limited* (1989) eKLR; and *Ternic Enterprises Limited vs. Waterfront Outlets Limited* (2018) eKLR, for the submission that where there exists a triable or arguable issue, then summary judgment should not be entered.
22. The appellant submitted that the respondent was not entitled to the summary judgment since he was not its (the respondent) tenant as contemplated in Order 36 of the Civil Procedure Rules, 2010; and that, accordingly, the trial court fell in error in granting its application. We were thus urged to allow the appeal with costs.
23. In response, and as to whether the appellant's preliminary objection should have been heard first, the respondent submitted that from the trial court proceedings, the trial court was not made aware of the existence of the preliminary objection, or that the appellant desired it to be heard in priority; that the respondent's Notice of Motion came up for hearing on 28<sup>th</sup> November 2019, having been served upon the appellant way back on 11<sup>th</sup> October 2019; that the respondent had been served with the replying affidavit a day before the hearing date; that learned counsel Mr. Lutta then appearing for the appellant apologised for having filed the response late, and in so doing, urged that the affidavit be admitted and thereafter, the matter can be fixed for hearing orally or by filling of written submissions; that at no point did the counsel mention a pending preliminary objection requiring to be heard, or that they required it to be heard in priority; that, in any event, the points raised in the objection were considered; and that the learned Judge appreciated the existence of the preliminary objection and addressed the arguments built around it as was submitted by both parties; and that in the circumstances, the appropriate recourse was for the appellant to file an application for striking out the suit under Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules, 2010, or apply for stay of proceedings under Section 6 of the [\*Civil Procedure Act\*](#).
24. We were urged to dismiss the appeal with costs.
25. We have considered the record of appeal, the respective rival submissions and the law. This being a first appeal on an interlocutory ruling where no evidence was tendered, our mandate is to re-assess, re-evaluate and re-analyse the record of appeal so as to reach an independent finding as we are mandated under rule 31(1) (a) of the Court of Appeal Rules, 2022.
26. In this interlocutory appeal, although the parties' submissions addressed a myriad of issues, our considered view is that the two main issues for determination are firstly, whether the learned Judge erred in not primarily considering the appellant's Notice of Preliminary Objection dated 19<sup>th</sup> February 2020 in the first instance. Put differently, whether the appellant's preliminary objection ought to have been heard in priority before the respondent's application for summary judgment. The second issue is whether there are any grounds to interfere with the learned Judge's exercise of discretion in granting summary judgment for vacant possession.



27. The Black's Law Dictionary (9<sup>th</sup> Edition) defines a preliminary objection as follows:
- “an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the court's jurisdiction is an example of a preliminary objection.”
28. The predecessor of this Court in *Mukisa Biscuit Manufacturing Co. Limited (supra)*, Law JA. defined a preliminary objection as:
- “....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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
29. Sir Charles Newbold, P. on the other hand added the following:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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. ”
30. In the case of *Wavinya Ndeti (supra)*, this Court observed that:
- “A preliminary objection is a recognized procedural device which is not normally limited in time for impugning in limine the competence of proceedings of whatever nature before a court of law. It is normally raised at the hearing of the proceedings in question and if upheld, the proceedings are terminated.”
31. In *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd (1989) KECA 48 (KLR)*, Nyarangi, JA. held:
- “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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
32. Plainly put, a preliminary objection raises points of law which more often than not challenges the jurisdiction of the court. When such an objection is raised, a court of law is under an obligation to determine the issues raised in limine for the reason that the findings thereof may ouster the trial court's jurisdiction altogether. Put differently, a court is obligated to determine a preliminary objection that raises a point of law in limine because such point of law may determine a suit in its entirety without the suit proceeding to a full trial. This Court in *Kenya Ports Authority vs. William Odhiambo Ramogi & 8 others (2019) eKLR* held in part that:
- “Whenever a challenge to jurisdiction is raised, the same has to be addressed as a threshold issue.”



33. It is common ground that the appellant raised a preliminary objection on a jurisdictional issue; it challenged the trial court's jurisdiction on the ground that the suit pending before it was sub-judice Mombasa ELC Petition No. 26 of 2019.

34. The doctrine of sub-judice is a principle that prohibits a court from proceeding with a trial or hearing of a matter which is already under consideration by another Judge. The essence thereof, is to avoid disrepute of court proceedings by embarrassing the court which is already seized with the matter in the event that the different courts make varied decisions. The principle too, is hinged on the well-known rule of avoiding a multiplicity of decisions over the same subject matter, so as to protect the integrity of the judicial process. The Supreme Court in *Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR stated thus:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> 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.”

35. Since the issue of res-judicata is a pure point of law, and which has a possible effect of terminating a suit at preliminary stage, the appellant's P.O ought to have been heard and determined first, or at the very least, together with the respondent's application for summary judgment, and the trial Judge erred in not directing to this effect. In addition, the trial Judge erred in making decisions on the P.O and that the doctrine of res judicata did not apply, without giving the parties, particularly the appellant, the opportunity to be heard on the issue.

36. On the second issue as regards whether there are grounds to interfere with the trial Judges' discretion, the applicable grounds were set out in *United India Insurance Co. Ltd,*

*Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd Vs East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”



- 37. In the present appeal, we note that there was a defence on record, and while the trial Judge observed in his ruling that it was filed out of time without leave, there was no application to strike out the said defence, and it was thus deemed to be properly on record and ought to have been considered. The trial Judge however proceeded on the assumption that there was no defence. In addition, the defence appeared to raise triable issues as regards the respondent’s ownership of the suit property. In the circumstances we find that there is a ground to interfere with the trial Judge’s discretion, having failed to consider this material consideration in his ruling.
- 38. From the foregoing, we arrive at the inescapable conclusion that the appeal is meritorious. Accordingly, we allow the appeal with the following orders issuing.
  - a. We set aside the ruling of Yano, J. delivered on 2<sup>nd</sup> March 2021.
  - b. We order that the suit, being Mombasa ELC No. 134 of 2019 - Kishushe Ranching Co-operative Society Limited vs. Newton Kifuso be and is hereby reinstated.
  - c. The appellant’s Preliminary Objection dated 19<sup>th</sup> February 2019 shall be heard on its merit before any other Judge of the ELC other than Yano, J.
  - d. Costs of this appeal will be borne by the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....  
**JUDGE OF APPEAL**

I certify that this is the true copy of the original  
signed

**DEPUTY REGISTRAR**

