

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CIVIL APPEAL CASE NO. E071 OF 2022**

**EVANS N. KING'ORI.....**

**.....APPELLANT**

**-VERSUS-**

**TIMOTHY GICHANGI**

**RIZIKI WAMBUI RASHID T/A**

**RAWA ESTATE AND MANAGING ESTATES.....**

**RESPONDENTS**

**JUDGEMENT**

1. Before this Court for determination is the Memorandum of Appeal dated **26<sup>th</sup> November 2020** by which the Appellant **EVANS NDUNGU KINGORI** seeks the following orders:-

**“(a) THAT the appeal be allowed.**

**(b) THAT judgment of the Honourable Magistrate M Okuche**

**delivered on 21<sup>st</sup> day of November 2020 at Nyeri**

**be and is hereby set aside and the same be**

**substituted with orders dismissing the suit and allow the appeal as prayed.**

**(c) THAT costs of this appeal and those of the High Court be and are hereby awarded to the Appellant.”**

2. The Respondents **TIMOTHY GICHANGI** and **RIZIKI WAMBUI T/A**

**RAWA ENTERPRISES** opposed the appeal.

3. The matter was canvassed by way of written submissions. The Appellants filed the written submissions dated **24<sup>th</sup> June 2025** whilst the Respondents relied upon their submissions dated **30<sup>th</sup> April 2025**.

#### **BACKGROUND**

4. The Appellant had filed in the chief Magistrates Court at Nyeri Civil Suit

**No. 208 of 2019** seeking General and Special damages as against the

Respondents.

5. The 2<sup>nd</sup> Respondent through their Advocates **GORI OMBONGI &**

**Co ADVOCATES** filed a Notice of Preliminary Objection dated **19<sup>th</sup>**

**August 2019** asking that the plaintiff's suit be struck out as the same

offended the provisions of **Section 6** of the **Civil Procedure Act 2010**

and was therefore bad in law and an abuse of Court Process.

6. That Preliminary Objection was canvassed in the Lower Court by way of

written submissions. Vide a Ruling delivered on **21<sup>st</sup> July 2020**.

**Hon. M OKUCHE Principal Magistrate**, upheld the Preliminary

Objection and struck out the Appellants suit.

7. Being dissatisfied by that ruling the Appellant filed instant appeal.

### **ANALYSIS AND DETERMINATION**

8. I have carefully considered this memorandum of appeal as well as the

record of Appeal filed in this matter.

9. This is a first appeal. It is settled law that the duty of the first appellate

court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its

own findings and conclusions [**see Peters -vs- Sunday post limited**

**[1958] E.A 424]**

10. In **SELLE and Another -vs- ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] 1 E.A 123** it was stated as

**“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on**

**some point to take into account particular circumstances or probabilities materially to estimate the evidence.”**

11. Likewise in **GITOBU IMANYARA & 2 Others -vs- ATTORNEY**

**GENERAL [2016] eKLR**, the **Court of Appeal** stated as follows:-

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

12. In the Lower Court the Respondent had filed a Preliminary Objection

challenging the suit which had been filed by the Appellant on grounds

that a similar suit seeking the same reliefs filed in the **Rent Restriction**

**Tribunal at Nyeri being Case No. 63 of 2017.**

13. The Respondents submitted that the suit filed by the Appellants in the

**Magistrates Court** ran afoul of **Section 6** of the **Civil Procedure**

**Act 2010**, 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 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.”**

14. **Section 6** certifies the principle of ‘**Sub judice**’ and is similar to

**Section 7** of the Act which deals with the principle of '**Res Judicata**'

In other words the Respondent was objecting to the suit filed by the

Appellant in the Lower Court on grounds that the same duplication of

the suit filed in the Rent Restriction Tribunal.

15. In **JOHN FLORENCE MARITIME SERVICES LIMITED -VS- CABINET SECRETARY FOR TRANSPORT and INFRASTRUCTURE**

**& 3 Others [2021] eKLR the Supreme Court of Kenya** stated thus

**"81 We reaffirm our position as in the Muiri Caffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principles of finality is one of the pillars upon which our Judicial System is founded and the doctrine of res Judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from**

**occasioning unnecessary costs to the parties and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party and liability for another party conclusively.....**

**(86) We restate the elements that must be proven before**

**a court may arrive at the conclusion that a matter is res judicata for res judicata to be invoked in a civil matter the following elements must be demonstrated;-**

**(a) There is a former judgment which was final.**

**(b) The judgment or order was on merit.**

**(c) The judgment or order was rendered by a court**

**having jurisdiction over the subject matter and the parties; and**

**(d) There must be between the first and the**

**second action identical parties, subject matter and cause of action.”**

16. With the above in mind I will proceed to consider the two sets of

pleadings filed in the **Rent Tribunal** as well as in the **Magistrates Court.**

17. Civil Suit No. **208 of 2019** was a suit filed by the Appellant seeking the following orders:-

**(a) General damages for loss of goods, harassment, mental torture and embarrassment.**

**(b) Special damages as stated in 8(b) plus costs and interest from 13/6/2017 to date.**

**(c) Costs of the suit.**

**(d) Any other relief this honourable court may deem fit.**

18. Before the Tribunal the same Appellant filed Rent Restriction Suit No. **63 of 2017** seeking the following orders:-

**“(a) A declaration that the Defendants are in flagrant contempt of the orders dated 1<sup>st</sup>**

**September 2017 and 20<sup>th</sup> November 2017 by this tribunal.**

**(b) A declaration that the plaintiff is entitled to an unconditional refund by the defendant of his deposit paid for occupation of the suit premises.**

**(c) An order that the Defendants do compensate the Plaintiff for the loss and damaged personal effects during the illegal eviction and which are held by the defendants at Kshs. 171,300/=.**

**(d) Costs of this suit and interest at court rates.**

**(f) Any other relief which this Honourable court deem just to grant.”**

19. It was submitted for the Respondents that ruling of the two suits

amounted to “**duplicity of proceedings**’ as both suits arose from

the same cause of action. Duplicity of suits arises where there are

filed two or more suits, over the same subject matter,  
involving the  
same parties.

20. A close comparison of the two complaints reveals that the  
matters involve  
the same parties and involve the same subject matter  
being the  
dispute between the Appellant and the Respondents  
regarding the alleged illegal eviction of the Appellant from  
the Respondents' premises.

21. In the case of **KENYA NATIONAL COMMISSION ON  
HUMAN RIGHTS -vs- ATTORNEY GENERAL, IEBC & 16  
Others [Interested Parties] (2020) eKLR** the **Supreme  
Court of Kenya** observed as follows:-

**“The term sub-judice is defined in Blacks 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.” [Own emphasis]**

22. In both suits the Appellant was seeking reliefs from the Tribunal and from the Court over what he claims was an illegal eviction from the Respondents premises where he was

a tenant. The Appellant cannot file a fresh suit based on the same facts in the Magistrates Court while the suit which he had filed before the Tribunal is still pending determination.

23. In the case of **JOHN FLORENCE MARITIME SERVICES LIMITED** [Supra] the **Supreme Court** did observe that

**59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, [2012] eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, [2001] EA 177 the court held that, ‘parties cannot evade the**

**doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”**

24. There is a clear duplication in the two suits. The Appellants attempt to disguise that duplicity by seeking different prayers will not fly.
25. I note that an investigation report was filed in the Rent Restriction Tribunal. Although there is no evidence that a decision was reached in the Tribunal the **Doctrine of exhaustion** requires that the Appellant first exhaust one remedy before moving to another. I note that the Appellant also filed several criminal complaints over the same issue at the **Nyeri Central Police Station** vide OB Number 46 71 and 52 and vide a judgment delivered on **5<sup>th</sup> April 2019** in **Nyeri CMCC No. 1139 of 2017** the 1<sup>st</sup> Respondent was convicted of the charge of Malicious damage, again arising from the same incident.
26. In **NISHITH YOGENDRA PATEL -vs- PASCALE MIREILLE BAKSH & Another [2009] eKLR**, the **Court of Appeal** in dealing with a similar application stated thus:-

**“.....we are of the view that the application before us is an abuse of the court process, as stated earlier, by pursuing the same remedies in parallel courts which are competent to deal with the application such conduct must be depreceated and discouraged. It is for that reason that we order that the notice of motion dated 25<sup>th</sup> October 2007 be and is hereby struck out.”**

27. The Appellant must decide and chose which suit he wishes to pursue. He cannot pursue two suits over the same cause of action. I concur with the learned magistrate that the suit in the magistrates court did contravene **Section 6** of the **Civil Procedure Act**. In my view the same amounts to an abuse of court process.
28. Finally I find no merit in this appeal. The same is dismissed in its entirety. Costs will be met by the Appellant.

**Dated in Nyeri this 14<sup>th</sup> day of November 2025.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL