

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E106 OF 2024

JOHN KIMANI MUCHIRI.....APPELLANT

-VERSUS-

EBENEZER COMMERCIAL WORKS LIMITED.
.....RESPONDENT

(Being an appeal from judgment and decree of the Small Claims Court at Thika (M. Kamau RM) claim number E1586 of 2023 dated 25th April 2024)

JUDGMENT

On 25th April 2024, Honourable M.W. Kamau sitting as an adjudicator in Thika Small Claims Court case number E1586 of 2023 struck out the appellant’s claim for reason that the same was *sub judice* this court’s constitutional petition number E001 of 2023 (hereinafter referred to as ‘the petition’). The ruling followed the respondent’s preliminary objection dated 11th January 2024 which was in the following terms;

1. **THAT** the Honourable Court does not have jurisdiction to hear the claimant’s claim as there is another matter on the same subject matter between similar parties (Thika HCCHRPET/001/2023) pending before another court in contravention of Section 13(2) of the Small Claims Court Act.
2. **THAT** the Honourable Court does not have jurisdiction to hear the said matter in the first instance in view of the provisions of Section 17 of the East African Community Vehicle Load Control Act, 2016.

The appellant was dissatisfied with the ruling and preferred this appeal citing the following grounds;

1. **THAT** the learned Magistrate erred in law in failing to find that sub judice is not a pure point of law competent of being raised by way of a Notice of Preliminary Objection.
2. **THAT** the learned Magistrate erred in law in finding that the appellant's claim was an effort at enforcing orders of the High Court when no such relief was sought by the appellant.
3. **THAT** the learned Magistrate erred in law in failing to find that the fact that the respondent was liable to imposition of a penalty or a fine for disobedience of court orders did not, in the absence of an express provision of law to the contrary, relieve the respondent from answering for damages to the appellant who was injured by that disobedience.
4. **THAT** the learned Magistrate erred in law in failing to find that an agent is liable to a third party injured by its actions done outside the scope of the agency relationship.
5. **THAT** the learned Magistrate erred in law in dichotomizing interim and final court orders suggesting that no civil liability accrues against a person for disobeying interim orders of court unless and until final orders have been made.

The common facts in this matter were that the appellant's motor vehicle registration number KCW 058R was impounded at Juja weighbridge by the respondent on 9th December 2023 for being overloaded. The respondent

impounded the motor vehicle in its capacity as an agent contracted by the Kenya National Highways Authority to manage Athi River, Juja and Isinya weighbridge stations. Following the impounding, the appellant filed the petition and obtained an order in the following terms;

1. ***THAT*** a temporary injunction is hereby granted against the respondent and/or its servants, employees or agents from continuing to impound vehicle registration no. KCW 058R pending hearing and determination of this application.
2. ***THAT*** this application be served on the respondent within 7 days.
3. ***THAT*** the response be filed within 14 days from date of service.
4. ***THAT*** directions be taken on 6/02/2023.

Following the above orders, the appellant filed the claim before the trial court claiming Kshs 948,000.00 being damages for conversion by detention of the motor vehicle between 13th December 2023 and 22nd December 2023. He claimed that the respondent continued detaining the motor vehicle even after it was served with the said court order.

The appeal was argued by way of written submissions. I have read the submissions of the appellant dated 17th April 2025 and those of the respondent dated 15th August 2025. The appellant argues that the rule of *sub judice* is not a matter to be considered as a purely point of law and therefore did not qualify to be a preliminary objection as it would require ascertaining of facts and probing of evidence.

The appellant has also taken issue with the court's finding that the claim was an effort to enforce orders in the petition. He argues that the reliefs sought in the claim had nothing to do with enforcement of the High Court orders but for damages arising from continued detention of his motor vehicle. He adds that, if the respondent were to be found having disobeyed the court orders, the remedy would be a different punishment which does not absorb the respondent from civil actions.

On its part, the respondent has argued that the objection it took out was on purely on a point of law. It contends that the matter in the small claims court was filed as a result of non-compliance with the orders in the petition which has not been determined, withdrawn or terminated. It further argues that its preliminary objection was premised on contravention of Section 13(2) of the Small Claims Courts Act and Section 17 of the East African Community Vehicle Load Control Act 2016.

The respondent has submitted further that the objection was on the jurisdiction of the court which were issues ascertainable from the pleadings of the parties. It argues that the appellant's act of omitting the Kenya National Highways Authority from the claim prejudiced the said Authority which was a party in the petition. It argues that the filing of the claim was a mechanism of enforcing contempt of court proceedings in an unorthodox manner.

This court notes that the issues raised in the trial court and in this appeal are on jurisdiction. As it has always been held in many judicial pronouncements, jurisdiction is everything and without it, a court or tribunal has no mandate to proceed further when the issue comes to its attention. It must first interrogate that

issue once it is raised and if it finds that it lacks jurisdiction, it must down its tools without advancing an inch further. In ***Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service (2019) KECA 767 (KLR)***, the Court of Appeal held that;

‘It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it.’

Similarly, in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (2017) KECA 79 (KLR)***, the Court of Appeal held that;

‘At the outset, it is without doubt that jurisdiction is everything, without which the court can do nothing else and must down its tools.’

It is trite that jurisdiction is conferred by either the Constitution or Statutes or both as it was held by the Supreme Court of Kenya in ***Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) KESC 8 (KLR)*** thus;

‘A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.’

The appellant approached the small claims court for reliefs in form of damages for conversion and detention. The jurisdiction of the small claims court is conferred by Section 12 of the Small Claims Courts Act (hereinafter referred to as ‘the Act’).

The appellant's preliminary objection was based on Section 13(2) of the Act which states that;

'A claim shall not be brought before the Court if proceedings relating to that claim are pending in or have been heard and determined by any other Court.'

The above provisions means that if it were not for existence of the petition, the respondent would not have had a problem with the jurisdiction of the court. I say so because the parties seem to have abandoned their stands on the second limb of the preliminary objection which was founded on Section 17 of the East African Community Vehicle Load Control Act, 2016. In that case, this court should establish the purport of Section 13(2) of the Act and answer the question whether pursuant to the said Section and in context of facts of this matter, the lower court erred in striking out the claim. The said Section in my view combines the principles of *sub judice* and *res judicata* similar to provisions of Sections 6 and 7 of the Civil Procedure Act.

In matters brought in ordinary courts, the principle of *sub judice* does not completely oust the jurisdiction of the court to the extent that the latter suit should be stayed instead of being struck out. However, the way Section 13(2) of the Act has been couched means that even filing of the suit whose issues are the same as in another suit pending in another court is prohibited and therefore the latter suit is amenable to striking out. The Supreme Court of Kenya in ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Party) (2020) KESC 54 (KLR)*** stated as follows about the sub-judice rule;

‘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.’

I note that none of the parties has exhibited the petition or pleadings therein other than the court order dated 11th December 2023. I have *suo moto* looked at the prayers in the petition and in my view, none of the prayers is directed or meant to affect the respondent’s relationship with the appellant in connection to the order dated 11th December 2023. In addition to seeking injunctive orders, the petition prays for declaration of unconstitutionality of various sections of the law and does not have anything to do with failure by the respondent to obey the court orders referred to above. Similarly, I do not see anything in the claim that would indicate that the appellant was on a mission to enforce the contempt of court proceedings. Whether or not the appellant suffered damages for the continued detention is a matter for trial which this court does not wish to go into.

I do agree with the appellant that the issue of *sub judice* in the manner raised by the respondent was not a purely issue of law as it required interrogation of facts and examination of facts. Existence of the petition *per se* is not enough to inform the court of whether the claim offended Section 13(2) of the Act. The parties and prayers in the two matters were different so was the cause of action. The petition was seeking constitutional declarations while the claim was based on tort of conversion and detention which in my view do not fall under the realm of a constitutional petition. In my opinion, a court can only award damages for violation of constitutional rights of a party but cannot deal with issues of tortious liability.

In the context of what I have stated above, it is obvious to me that for the trial court to make decision on whether the suit was *sub judice* it had to go through documents and pleadings in the petition and make analysis of the facts in both matters. I agree with the holding of Honourable Justice L. Gacheru in ***Margaret Wachu Karuri v John Waweru Ribiro (2021) 2793 (KLR)*** and restated by Honourable Justice M.D. Mwangi in ***Kiyo & another v Kangemi Rumwe Women Group Limited & 3 others; Njuguna (Interested Party) (2022) KEELC 14467 (KLR)*** where the Honourable Judge held that;

‘That is exactly the nature of the preliminary objection before me. For the court to determine whether the issues herein are directly and substantially in issue in HCCC/E297/2021, 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 petition are the same as the ones in the HCCC/E297/2021 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 simply have to be ascertained.’

If the respondent desired the court to make an informed decision on the issue, it should have filed an application with affidavits and produce documents in the petition to enable the court ascertain the similarity of the two matters. In the circumstances, I find that striking out the claim pursuant to the preliminary objection was not appropriate.

In view of what I have stated above, this appeal is allowed in the following terms;

- a. The ruling and orders of the small claims court dated 25th April 2024 striking out the appellant's claim is hereby set aside and the claim reinstated.
- b. The claim shall be placed before an Adjudicator other than Honourable M.W. Kamau for hearing and determination.
- c. The appellant is awarded the costs of this appeal.

Dated, signed and delivered at Nairobi this **14th** day of **November** 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Kimani for the appellant and in absence of the respondent.