



REPUBLIC OF KENYA



**Nkamasiai & another v Juhudi Kilimo Co. Limited & another (Civil Appeal
E006 of 2025) [2026] KEHC 1834 (KLR) (19 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1834 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E006 OF 2025
CM KARIUKI, J
FEBRUARY 19, 2026**

BETWEEN

KISOINE NKAMASIAI 1ST APPELLANT

SALESIO MWANIKI MUCHIRI 2ND APPELLANT

AND

JUHUDI KILIMO CO. LIMITED 1ST RESPONDENT

LEGACY AUCTIONEERING SERVICES 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. Mutuku Esther Mwikali, Resident Magistrate,
delivered on 21st January, 2025, at Narok Chief Magistrate Courts Civil Case No. E254 OF 2024)*

JUDGMENT

Introduction:

1. This is the first appeal arising from the ruling of Hon. Mutuku Esther Mwikali (Ms.), Senior Resident Magistrate, delivered on 21st January 2025 in Narok CMCC No. E254 of 2024. By the impugned ruling, the learned trial magistrate upheld a Preliminary Objection dated 11th December 2024 and ordered that the suit be stayed under Section 6 of the *Civil Procedure Act* pending the determination of Narok MCELC No. E123 of 2024. The court further set aside the interim injunctive orders earlier issued.
2. The Appellants, being dissatisfied with the entire ruling, lodged the present appeal challenging the propriety of upholding the Preliminary Objection on grounds of sub judice.
3. As this is a first appeal, this Court is obligated to re-evaluate the record and draw its own independent conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the parties. See *Selle & Another v Associated Motorboat Co. Ltd & Others* [1968] EA 123 (Court of Appeal for East Africa).



Memorandum Of Appeal

4. The Appellants' Memorandum of Appeal dated 20th February 2025 raises the following grounds:
 - i. That the learned trial magistrate erred in law in failing to appreciate that a Notice of Preliminary Objection should only raise pure points of law.
 - ii. That the learned trial magistrate erred in law and fact in considering factual evidence raised by the Respondents in the Notice of Preliminary Objection.
 - iii. That the learned trial magistrate erred in law and fact in failing to appreciate the Appellants' submissions and authorities demonstrating that the Preliminary Objection was improper.
5. The Appellants pray that: The ruling delivered on 21st January 2025 be set aside; Appropriate consequential orders be issued; Costs of the appeal be awarded to them.

Summary Of The Parties' Submissions:

Appellants' Submissions

6. The Appellants submit that a Preliminary Objection must raise a pure point of law, argued on the assumption that the facts pleaded by the opposing party are correct.
7. They rely on the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 (Court of Appeal for East Africa), where Law JA stated:

“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.”
8. Further reliance was placed on: *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, Supreme Court Civil Application No. 23 of 2014; [2014] eKLR, *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others*, Supreme Court Application No. 50 of 2014; [2015] eKLR. In both cases, the Supreme Court emphasized that a Preliminary Objection must raise a pure point of law and not require ascertainment of contested facts.
9. The Appellants argue that the trial magistrate expressly acknowledged that no pleadings from the alleged previous suit had been filed. Despite that, she independently perused the Court Tracking System (CTS) to confirm the existence and contents of Narok MCELC No. E123 of 2024.
10. They contend that by stepping outside the record and interrogating facts not formally placed before her, the magistrate converted the Preliminary Objection into a factual inquiry, thereby offending the *Mukisa Biscuit* case principles.
11. They also rely on:
 - i. *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR (Supreme Court of Kenya) — where the Court held that a Preliminary Objection is improper where the Court must evaluate evidence or contested facts.
 - ii. *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR (High Court, Mativo J as he then was) — outlining the elements of sub judice.



- iii. *Ita v Nyaga* [2023] KEELC 22514 (KLR) — where it was observed that sub judice ordinarily leads to a stay, not termination, and may be better raised by formal application rather than preliminary objection.
12. They urge this Court to allow the appeal and set aside the ruling.

(B) Respondents' Position (as reflected in the record)

13. The Respondents did not file submissions.

Issues For Determination:

14. From the grounds of appeal and submissions, the following issues arise:
- i. Whether the issue of sub judice under Section 6 of the *Civil Procedure Act* can properly be raised by way of a Preliminary Objection.
 - ii. Whether the learned trial magistrate erred in considering material not formally placed before the court in determining the Preliminary Objection.
 - iii. Whether the elements of sub judice were satisfied.

Analysis And Determination:

Issue 1: Whether Sub Judice Can Be Raised by Preliminary Objection

15. Section 6 of the *Civil Procedure Act* provides:
- “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...”
16. The doctrine of sub judice is statutory. Its application depends on comparing:
- i. The parties,
 - ii. The subject matter,
 - iii. The issues in controversy,
 - iv. The pendency of a prior suit.
17. Where these elements are evident from the pleadings on record or are matters of judicial notice, the objection raises a point of law.
18. Courts have consistently upheld Preliminary Objections founded on jurisdictional bars, including limitation and sub judice. In *Mukisa Biscuit* (supra), jurisdictional objections were expressly recognized as proper preliminary objections.
19. Sub judice, being a statutory limitation on the court's authority to proceed, is a jurisdictional issue. Accordingly, in principle, it may be raised by Preliminary Objection.
20. The decision in *Ita v Nyaga* [2023] KEELC 22514 (KLR) does not lay down a binding rule prohibiting the use of a Preliminary Objection in sub judice matters. Rather, it comments on procedural preference.
21. This Court therefore finds that sub judice may properly be raised by way of Preliminary Objection.



Issue 2: Whether the Magistrate Erred in Consulting the CTS Record

22. The trial magistrate stated that no pleadings from the other suit had been annexed, but that the trial court perused CTS and confirmed the existence and contents of Narok MCELC No. E123 of 2024.
23. The existence of court proceedings within the same station is a matter of public record and judicial notice. A court is not required to feign ignorance of its own records.
24. Under Sections 59 and 60 of the *Evidence Act* (Cap 80), courts may take judicial notice of matters of public record. Court proceedings fall within that category.
25. The magistrate did not receive extraneous evidence from a party; rather, she verified a court record within the same judicial registry. That act did not amount to descending into the arena of conflict.
26. The objection required determining:
 - i. Whether another suit existed;
 - ii. Whether it involved the same subject matter and parties.
27. These are ascertainable from pleadings. The magistrate's confirmation through CTS did not convert the objection into a factual trial.
28. The Supreme Court authorities cited by the Appellants concern situations where evidence must be weighed. That was not the case here. The existence of a prior suit is an objective, verifiable fact.

Issue 3: Whether the Elements of Sub Judice Were Satisfied

29. As set out in *Kenya Bankers Association v Kenya Revenue Authority* [2019] eKLR, the elements are:
 - a. Existence of two suits.
 - b. Direct and substantial similarity of issues.
 - c. Same parties or parties litigating under the same title.
 - d. Pendency before courts of competent jurisdiction.
30. From the record:
 - i. Both suits were filed on 24th October 2024.
 - ii. Both concerned Title No. CIS-MARA/NAIRAGIE ENKARE/1052.
 - iii. Both arose from the intended auction scheduled for 25th October 2024.
 - iv. Parties were identical or substantially identical;
 - v. Both courts had jurisdiction.
31. The risk of conflicting injunctive orders was real. Indeed, interim orders had been issued in both matters.
32. The purpose of Section 6, as explained in *David Ndi & Others v Attorney General & Others* [2021] eKLR, is to prevent multiplicity of suits and conflicting decisions.
33. The learned magistrate correctly identified and addressed that mischief.



Conclusion:

34. Upon re-evaluating the record and the law, this Court finds:

- i. Sub judice is a jurisdictional question capable of being raised by Preliminary Objection.
- ii. The trial magistrate did not err in verifying the existence of another suit within the court system.
- iii. All elements of Section 6 of the *Civil Procedure Act* were satisfied.
- iv. The stay order was proper and legally sound.
- v. The appeal therefore lacks merit.

Disposition:

- i. The Appeal is hereby dismissed in its entirety.
- ii. The ruling delivered on 21st January 2025 in Narok CMCC No. E254 of 2024 is hereby upheld.
- iii. The stay of proceedings pending the determination of Narok MCELC No. E123 of 2024 remains in force.
- iv. Costs of this appeal are awarded to the Respondents.

35. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
19TH DAY OF FEBRUARY, 2026**

.....

CHARLES KARIUKI

JUDGE

