

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. 6 OF 2023**

**FRANCIS KAMAU..... APPELLANT**

**VERSUS**

**JOEL KIMOTHO NJOROGE.....RESPONDENT**

*(Being an appeal from the ruling of Hon. R Otieno,  
(RM)/Adjudicator in Thika Small Claim Commercial case no. E460  
of 2022 delivered on 9<sup>th</sup> March, 2023)*

**JUDGEMENT**

1. This appeal emanates from the ruling of the lower court, in which the said court dismissed the appellant's application seeking for orders to pay the decretal sum in instalments and a stay of the sale of his properties, on grounds that the said application was res judicata.
2. The background to the present appeal, is that the respondent instituted a commercial case at the Thika Small Claims Court vide a Statement of Claim dated 27<sup>th</sup> June, 2022 and filed on 5<sup>th</sup> July, 2022, seeking a refund of Kshs. 200,000, allegedly advanced to the appellant as a loan.
3. The appellant denied the claim and upon hearing the matter, the trial court entered judgement in favour of the respondent. The appellant then filed an application before the trial court dated 26<sup>th</sup> October, 2022, seeking that he be allowed to pay the decretal sum in instalments of alternate figures of Kshs. 30,000 and Kshs. 15,000 each month until payment in full.

4. After considering the application, the learned trial magistrate dismissed the matter on grounds that the applicant had failed to avail any form of evidence to support his assertion that he was unable to settle the decretal sum in lump sum. The Appellant again approached the trial court vide an application dated 15<sup>th</sup> February, 2023, seeking orders to pay the decretal sum in instalments and for stay of the sale of his properties.
5. Upon considering the application, the learned trial magistrate delivered the impugned ruling. The appellant was aggrieved by the said ruling, hence the present appeal.
6. In his Memorandum of Appeal dated 15<sup>th</sup> March, 2023, the appellant faulted the learned trial magistrate for denying his prayer to continue paying the decretal amount in instalments, for dismissing his application dated the 15<sup>th</sup> of February, 2023, and for failing to consider his financial status when determining the matter.
7. On the above grounds, the appellant urged this court to issue an order allowing him to pay the decretal amount in instalments of alternate figures of Kshs. 30,000 and Kshs. 15,000 each month until payment in full, that this court allows his appeal and set aside the ruling delivered by the trial court on 9<sup>th</sup> March, 2023 and all consequential orders.
8. The appeal was canvassed by way of written submissions. In his written submissions dated 13<sup>th</sup> May, 2024, the appellant alleged that his appeal is justified, given that the learned trial magistrate erred in law and in fact, for denying him the opportunity to pay the decretal sum in instalments without regard for his financial status.

9. The appellant further submitted that, although he is willing to pay the decretal amount, he is presently unable to do so in lump sum due to the fact that the project from which he anticipated returns remains incomplete and is currently generating minimal income. He argued that, in light of prevailing economic conditions, he is unable to pay the decretal amount in lump sum. Consequently, he expressed his willingness to pay the outstanding balance by way of monthly instalments of Kshs. 30,000 and Kshs. 15,000, which he averred he is presently capable of paying, while also meeting his family and daily living expenses.
10. The appellant contended that his application was made in good faith, given that despite his current financial difficulties, he is still determined to clear the balance having already made payments in instalments to the tune of Kshs. 130,000, which amount is 50% of the decretal sum. The appellant also contended that the trial court ought to have allowed him pay the unpaid balance in instalments as prayed, given that both parties were agreeable to payment in instalments.
11. The appellant, in his submissions, further contended that the application before the trial court dated 26<sup>th</sup> October, 2022, was dismissed on procedural technicalities rather than on merit, as such, the application dated 15<sup>th</sup> February, 2023, cannot be said to be res judicata.
12. The appellant submitted that the two appeals arise out of distinct applications which were seeking different and distinct orders; and further that he had applied to have the two appeals consolidated as they relate to the same file, being scccomm no. E460 of 2022, which prayer was not granted.

13. On the other hand, the respondent in his written submissions dated 18<sup>th</sup> June, 2024, submitted that the appellant's application dated 15<sup>th</sup> February, 2023, filed in the small claims court at Thika, was *res judicata* his application dated 26<sup>th</sup> October, 2022, which had been dismissed by the said court.
14. He contended that the present appeal is sub judice Appeal No. 307 of 2023, on the basis that both appeals arise from Thika Small Claims Commercial Case No. E460 of 2022, involve the same parties, seek similar prayers, and are founded on the same subject matter, being that, the appellant be allowed to pay the decretal sum by monthly instalments in the alternate amounts of Kshs. 30,000 and Kshs. 15,000.
15. The respondent submitted that the present appeal is an abuse of the court process, vexatious, a waste of the court's precious judicial time and has been made in bad faith. He urged this court to dismiss the appeal with costs.
16. In response, the appellant filed a further written submission dated 23<sup>rd</sup> July, 2024, wherein he submitted that the present appeal cannot be said to be *res judicata*, as he is appealing a lower court's ruling that is yet to be determined; and further, that the present appeal is a continuation of the original suit and not a new or separate suit, as such, the issues raised in the appeal are still part of the original case.
17. On whether the appeal is sub judice, the appellant submitted that he had earlier on requested for a consolidation of the two appeals, so as to achieve the overriding objectives under the Civil Procedure Act, but his

application for consolidation was objected by the respondent and subsequently denied by the court.

18. I have duly considered the grounds of appeal, the record of the trial court, together with the rival written submissions by the parties, having done so, I find that the issues for determination is whether the present appeal is merited.

19. That said, the respondent in this case had alleged that the present appeal is sub judice the appellant's appeal no. 307 of 2023, as such, the same should be dismissed with costs.

20. **Section 6** of the Civil Procedure Act, stipulates as follows:

***“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 the same parties, or 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.”***

21. The Supreme Court in ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR***; stated as follows regarding sub judice:

***“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th 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.”***

22. From my perusal of the present appeal which was filed on 15<sup>th</sup> of March, 2023, and Thika HCCA 307 of 2023, filed on 22<sup>nd</sup> November, 2022, it is evident that the two appeals filed by the appellant before this court, not only involve the same parties, but both appeals relate to the same subject matter. The appellant in both appeals, also seeks similar orders, which is that he should be allowed to pay the decretal sum in instalments. It is therefore evident that the present appeal is sub judice the appeal in Thika HCCA 307 of 2023.
23. The appellant had however stated that he had made an application to consolidate the two appeal, which application was denied by the court. It is trite that an application for consolidation of suits cannot be used to cure the doctrine of *sub judice*.

24. This position was restated by the court in ***Republic versus Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR***; as follows: ***“The issues at hand are crystal clear, namely, whether this suit offends the question of sub judice and whether it is an abuse of court process. If the answers are in the affirmative, then consolidation would be impermissible because its application was never meant to cure or cover the doctrine of sub judice or abuse of court process. Put differently, a plea for consolidation is not permissible in circumstances whereby it is evident it is being used to evade the wrath of the sub judice rule as opposed to serving the settled principles of consolidation laid down in the above authorities.”***

25. Having found that the present appeal is *sub judice* Thika HCCA 307 of 2023, which appeal has already been determined by this court, ***I find that the present appeal be dismissed with costs to the respondent.***

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**HON. T. W. Ouya  
JUDGE**

**For Respondent .....Gathaya Gachuvi  
For Appellant.....No Appearance  
COURT ASSISTANT.....Brian**

ORIGINAL