



**Njuguna (Suing as the personal representative of the Estate of Dennis Moimbo Ongayo) v
Gatheba (Civil Suit 13 of 2010) [2026] KEHC 2586 (KLR) (19 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT 13 OF 2010
JK SERGON, J
FEBRUARY 19, 2026**

BETWEEN

**MARGARET MUGURE NJUGUNA (SUING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF DENNIS MOIMBO
ONGAYO) PLAINTIFF**

AND

JOHN NDUNGU GATHEBA DEFENDANT

RULING

1. The issue in dispute between the parties is that the Plaintiff/Respondent filed a declaratory suit and garnishee proceedings at Milimani Chief Magistrate's Court based on the decretal sum and any liabilities arising out of Kericho HCC No. 13 of 2011 in the sum of Kshs. 6,609,251.52/=.
2. The Defendant/Applicant was aggrieved citing discrepancies in the decretal amount, given that this court delivered a ruling on reassessment of damages on 29th May, 2020 and the damages reassessed at Kshs. 2,295, 100/=, the parties had previously recorded a consent on liability at 80:20% in favour of the Plaintiff/Respondent therefore bringing the total award to Kshs. 1,836,080/= plus costs and interest at court rates.
3. The Defendant/Applicant's is therefore apprehensive that the Plaintiff/Respondent shall proceed with the execution of the grossly excessive and unreasonable amount which was not approved and certified by this Court. The Defendant/Applicant moved this court vide a notice of motion dated 30th April, 2025 seeking to have this court exercise its supervisory jurisdiction over the execution of its judgment delivered on 25th January, 2012 and the ruling on reassessment of damages delivered on 29th May, 2020.



4. The plaintiff/respondent raised a preliminary objection in response to the instant application on the primary grounds that the instant application is sub judice and res judicata as the Defendant/Applicant had filed a similar application vide Nairobi High Court Miscellaneous Application No. E551 of 2025.
5. In the notice of motion dated 30th April, 2025 the defendant/applicant is seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That the firm of Nambulu Wamaitha & Okinyi Advocates LLP be granted leave to come on record for the Defendant/Applicant.
 - (iv) That this honourable court be pleased to exercise its supervisory jurisdiction over the execution of its judgment delivered on 25th January, 2012, ruling on reassessment of damages delivered on 29th May, 2020 and all consequential orders arising from execution thereof.
 - (v) That this honourable court be pleased to call for the records of Milimani Chief Magistrate's Court Civil Suit E4615 of 2024.
 - (vi) That this honourable court be pleased to dismiss the declaratory suit and garnishee proceedings as the subject matter of the said suits was not within the jurisdiction of Milimani Chief Magistrate's Court in Civil Suit E4615 of 2024.
 - (vii) Spent
 - (viii) Spent
 - (ix) That the costs be provided for.
6. The application is supported by the grounds stated on the face of it and an affidavit in support of the application sworn by Teresia Wamaitha, an advocate of the High Court of Kenya practicing as such in the firm of Nambulu Wamaitha & Okinyi Advocates LLP.
7. She deposes that the Plaintiff/Respondent filed a suit for compensation following a road traffic accident that occurred on 27th October, 2008 and that judgment in the matter was delivered on 25th January, 2012 in favour of the Plaintiff/Respondent. However, being dissatisfied with the award they filed an application in the Court of Appeal at Nakuru, vide Civil Appeal No. 321 of 2013 for review of the judgment and reassessment of damages.
8. She deposes that on 12th October, 2018, judgment in the said Civil Appeal No. 321 of 2013 was delivered and the Court of Appeal directed that the matter be placed before the High Court for reassessment of damages and the same was done and a ruling on reassessment of damages delivered on 29th May, 2020 and the damages reassessed at Kshs. 2,295, 100/= and parties had previously recorded a consent on liability at 80:20% in favour of the Plaintiff/Respondent, bringing the total award to Kshs. 1,836,080/= plus costs and interest at court rates.
9. She further deposes that on 3rd September, 2024 the Plaintiff/Respondent filed a declaratory suit in Milimani Chief Magistrate Court vide Civil Suit No. E4615 of 2024 MARGARET MUGURE NJUGUNA (suing as the personal representative of the estate of Dennis Moimbo Ongayo (deceased) v African Merchant Assurance Co. LTD seeking for a declaration that the Defendant/Applicant is bound to pay the decretal sum and any liabilities arising out of Kericho HCC No. 13 of 2011 in the sum of Kshs. 6,609,251.52/=



10. She avers that there are discrepancies and inconsistencies in the Plaint filed by the Plaintiff/Respondent in the said declaratory suit as follows;
 - (i) Paragraph 7 of the plaint reads “ Costs estimated at Kshs. 659,515.80/= as per the Bill of Costs filed.” However the costs were never taxed before a taxing matter.
 - (ii) paragraph 8 of the plaint reads “ that accrued interest on the said judgment sum the date of filing suit herein is Kshs. 4,113,645.72/=.” However, the Plaintiff/Respondent did not provide any decree and/or court assessed and approved interest sum.
 - (iii) paragraph 9 of the plaint reads “ the decretal sum outstanding as of the date of filing suit is Kshs. 6,609,251.52/=, being judgment sum, costs and accrued interest and the same continues to accrue at court rates and which the Plaintiff claims.”
11. She argued that the decretal sum should be as follows;
 - (i) Principal amount: Kshs. 1,836,080/= (Kshs. 2,295,100/= 20% less)
 - (ii) Interest (applying 12%) from 25/1/2012 to 3/9/2024: Kshs. 2,772,480.8/= (to be assessed by court)
 - (iii) Costs (required to taxed by Honourable Deputy Registrar)
 - (iv) Estimated Total: Kshs. 4,608,560.8/=
12. She avers that on 18th October, 2024, an interlocutory judgment was entered against the Defendant/Applicant in Milimani Chief Magistrate’s Court Civil Suit E4615 of 2024 and thereafter a decree issued on 4th March, 2025 in the sum of Kshs. 7,250,367.50/=.
13. She further avers that on 6th March, 2025 the Plaintiff/Respondent proceeded to file a garnishee application against the Defendant/Applicant in Milimani Chief Magistrate’s Court Civil Suit E4615 of 2024 and the garnishee order nisi was made absolute in the sum of 7,250,367.50/= with costs assessed at Kshs. 100,000/= to the decree holder and Kshs. 30,000/= to each garnishee.
14. She is adamant that the Defendant/Applicant is apprehensive that the Plaintiff/Respondent shall proceed with the execution of the grossly excessive and unreasonable amount which was not approved and certified by this Court.
15. The respondent raised a preliminary objection dated 10th July, 2025 premised on a point of law in response to the instant application on the primary grounds that the instant application is sub judice and res judicata as the Defendant/Applicant had filed a similar application vide Nairobi High Court Miscellaneous Application No. E551 of 2025.
16. The respondent also filed grounds of opposition citing that the applicant deliberately misled this honourable court and/ or has been economical on material facts and in particular the existence of Court Orders issued in Nairobi High Court Misc Application No E551 of 2025 prior to the filing of the application herein in itself an abuse of the court process. The respondent attached a copy of the court orders and a copy of the miscellaneous application, namely Nairobi High Court Misc Application No E551 of 2025.
17. This court was called upon to determine whether preliminary objection has merit. The application came up for inter partes hearing. The learned counsel for the Defendant/Applicant maintained that the instant application is competently before this Court.



18. The learned counsel for the Plaintiff/Respondent contended that the instant application is res judicata and sub judice having obtained orders in the application vide Nairobi High Court Miscellaneous Application No. E551 of 2025. She was adamant that the Defendant/Applicant was forum shopping.
19. I have considered the application, preliminary objection and the oral submissions and find that the issue for determination in this ruling is whether the preliminary objection has merit.
20. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696 by Sir Charles Newbold J.A as follows: “So far as I am aware, 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.”
21. The Court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection showed raises pure points of law, which is argued on the assumption that all facts pleaded by the other side are correct or arises by clear implication out of pleadings.
22. It is trite law that a preliminary objection cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the court held that: - “When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
23. In the case of Oraro v Mbaja (2005) 1KLR 141, the court held that: - “Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”
24. In considering whether the instant application is sub judice and res judicata, this court will be required to make further judicial inquiry by ascertaining the facts from elsewhere apart from looking at the pleadings which will therefore defeat the whole purpose of what a preliminary objection constitutes.
25. The upshot is that the preliminary objection dated 10th July, 2025 is hereby dismissed. I make no orders as to costs.
26. Having disposed of the Preliminary Objection, the Application dated 30/4/2025 is fixed for interpartes hearing on 21/4/2026.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 19TH DAY OF FEBRUARY, 2026

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J.K. SERGON

JUDGE

In the presence of:-

C/Assistant – Rutoh

Miss Obaga for Plaintiff/Respondent

No Appearance for Defendant

