



**Tingle Software Company Limited v Pesa Pata Ventures Limited
& 2 others (Miscellaneous Civil Application E662 of 2024)
[2026] KEHC 2398 (KLR) (Commercial and Tax) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E662 OF 2024
PM MULWA, J
FEBRUARY 26, 2026**

BETWEEN

TINGLE SOFTWARE COMPANY LIMITED APPLICANT

AND

PESA PATA VENTURES LIMITED 1ST RESPONDENT

PADDY MICRO INVESTMENT LIMITED 2ND RESPONDENT

OKOA MIA VENTURES LIMITED 3RD RESPONDENT

RULING

1. The Court is called to determine the Respondent's Notice of Preliminary Objection dated 18th November 2024 and the Applicant's Notice of Motion application dated 20th August 2024. The two were canvassed consecutively by way of written submissions.

Notice of Motion dated 20th August 2024

2. The application is brought pursuant to sections 1A, 1B, 3, 3A & 59 of the *Civil Procedure Act*, Order 11 Rule 4(3), Order 40 Rule 1, Order 46 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010, section 6(1) of the *Arbitration Act*, 1995, Articles 47, 48, 50 and 159(2) (c) of *the Constitution*. In a nutshell, the applicant seeks the following substantive orders:
 - i. A stay of proceedings in Milimani MCCC No. E3964 of 2024 Pesa Pata Ventures Limited & 2 others v Tingle Software Company Limited and all consequential orders arising therefrom pending the hearing and determination of this application



- ii. Setting aside and stay of execution of the orders issued by Honourable Becky Cheloti Mulema (CM) on 7th August 2024 and 13th August 2024 in Milimani MCCC no. E3964 of 2024.
 - iii. An order referring the matter to arbitration pursuant to the provisions of clause 13 of the Software Development Agreement dated 1st August 2019.
 - iv. The Respondents bear the costs of the application.
3. The application is premised on the grounds of the face of the record and supported by the annexed affidavit of Maxwell Weru Mburu who deposes that the subordinate court issued ex parte interlocutory orders in the nature of a mandatory injunction in Milimani MCCC No. E3964 of 2024, restraining the applicant from interfering with the management and control of the software application “269 Pesa Pata version 2, Pesa Pata 3, Okoa Mia and Scope”. He further contends that the dispute is governed by an arbitration clause which the learned Magistrate failed to consider, and that the Respondents are enforcing the impugned orders through law enforcement agencies, thereby occasioning prejudice to the Applicant.

Notice of Preliminary Objection dated 18th November 2024

4. The Respondent’s Notice of PO in a nutshell is premised on the following grounds:
- i. That the court lacks jurisdiction to hear and determine the application.
 - ii. That the application offends the doctrine of sub judice as per section 6 of the [Civil Procedure Act](#), there is an appeal in the High Court HCCA E1058 of 2024 Tingle Software Company Limited v Pesa Pata Ventures Limited and 2 others involving the same parties and concerning the same issues, which appeal is pending for determination.
5. Parties filed written submissions. The Respondents submit that the PO is properly taken as it raises pure points of law, namely that the application offends the sub judice rule under Section 6 of the [Civil Procedure Act](#), given the pendency of Milimani MCCC No. E3964 of 2024 and HCCA No. E1058 of 2024 involving the same parties and subject matter. They contend that the Application amounts to forum shopping and abuse of process, that the arbitration clause was waived by the Applicant’s participation in the Magistrate’s Court proceedings, and that no basis has been laid for injunctive relief.
6. The Applicant, in opposition, argues that the PO is incompetent as it hinges on contested facts, that this Court has unlimited and supervisory jurisdiction under Article 165 of [the Constitution](#), and that the dispute is mandatorily referable to arbitration under Clause 13 of the Software Development Agreement and Section 6 of the [Arbitration Act](#), thus warranting stay of the subordinate court proceedings and referral to arbitration, with costs awarded in its favour.

Analysis and determination

7. I have considered the application, as well as the PO and the submissions filed. The issues that arise for determination are;
- i. Whether the preliminary objection is merited
 - ii. Whether the court has jurisdiction in light of the doctrine of sub judice
 - iii. Whether the application dated 20th August 2024 is merited
 - iv. Who bears the costs.



Whether the PO is merited

8. The law on preliminary objections is settled. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated that

“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.”
9. Jurisdiction is a pure point of law. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Nyarangi JA held that jurisdiction is everything and without it a court must down its tools.
10. The objection herein is anchored on Section 6 of the [Civil Procedure Act](#). The existence of Milimani MCCC No. E3964 of 2024 and HCCA No. E1058 of 2024 is not disputed. Whether those proceedings render this Application sub judice is a legal question capable of determination from the pleadings. I therefore find that the PO is properly taken.

Whether the Court has jurisdiction on account of sub judice

11. 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 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.”
12. The record demonstrates that the orders of 7th and 13th August 2024 sought to be stayed and set aside in the instant application are the subject of HCCA No. E1058 of 2024. The Applicant has invoked the appellate jurisdiction of this Court in respect of those very orders. To entertain a parallel miscellaneous application seeking substantially the same relief would offend the doctrine of sub judice and expose the judicial process to the risk of conflicting determinations.
13. The Court of Appeal in *Kenya National Commission on Human Rights v Attorney General; IEBC & 16 Others (Interested Parties)* [2020] eKLR emphasized that the doctrine of sub judice is aimed at preventing multiplicity of proceedings and guarding against abuse of the court process.
14. The Applicant urges the Court to exercise supervisory jurisdiction under Article 165(6) of [the Constitution](#). However, supervisory jurisdiction cannot be invoked where a litigant has already elected to pursue the appellate process. As held in *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others* [2012] eKLR, a court’s jurisdiction flows from [the Constitution](#) and statute and cannot be expanded by judicial craft.
15. I am satisfied that the substratum of this application is directly and substantially in issue in the pending appeal. Accordingly, this Court is divested of jurisdiction by operation of Section 6 of the [Civil Procedure Act](#).



On referral to Arbitration

16. The Applicant relies on Section 6(1) of the *Arbitration Act* and Clause 13 of the Software Development Agreement. Section 6 requires that an application for stay pending arbitration be made not later than the time of entering appearance.
17. The material placed before the Court shows that the Applicant participated in the subordinate court proceedings prior to raising the arbitration clause. In *Niazsons (K) Ltd v China Road & Bridge Corporation (K) Ltd* [2001] eKLR, the Court held that a party who takes steps in proceedings without invoking arbitration may be deemed to have waived that right.
18. In any event, the propriety of the subordinate court's assumption of jurisdiction is an issue properly falling for determination in the pending appeal. This Court cannot, in a collateral proceeding, interrogate and set aside orders that are already the subject of appellate scrutiny.
19. Having found that the PO is meritorious and that this Court lacks jurisdiction by virtue of the doctrine of sub judice, it follows that the Notice of Motion dated 20th August 2024 is bereft of merit.
20. Consequently:
 - a. The Respondents' Notice of Preliminary Objection dated 18th November 2024 is upheld.
 - b. The Applicant's Notice of Motion dated 20th August 2024 is struck out.
 - c. The Respondents are awarded the costs of both the Preliminary Objection and the Application.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2026.

P.M. MULWA

JUDGE

In the presence of:

Mr. Macharia for Applicant

Ms. Murage h/b for Mr. Wachira for Respondents

Court Assistant: Carlos

