



**Reps Consultants Co Limited v Ng'ang'a & another; Orege
& another (Interested Parties) (Environment and Land Appeal
E014 of 2023) [2025] KEELC 5782 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

MD MWANGI, J

JULY 24, 2025

BETWEEN

REPS CONSULTANTS CO LIMITED APPELLANT

AND

ARTHUR KAHURANI NG'ANG'A 1ST RESPONDENT

COUNTY LAND REGISTRAR KAJIADO COUNTY 2ND RESPONDENT

AND

EVANS ORENGE INTERESTED PARTY

FREDRICK OMONDI OSAMO INTERESTED PARTY

*(Being an appeal from the Ruling of Hon. R.A Oganyo (CM) delivered on 5th
September, 2023 in Kajiado Chief Magistrate's ELC Suit No. E053 of 2023)*

JUDGMENT

Background

1. This Judgment is in respect of the appeal against the Ruling of Hon. R.A Onyango (CM) delivered on 5th September, 2023 in Kajiado CMCELC No. E053 of 2023. Aggrieved with the verdict of the Learned Magistrate, the Appellant who was the Plaintiff in the case before the trial court lodged a Memorandum of Appeal dated 14th September, 2023 setting out the grounds of appeal as follows;
 - a. The learned Trial Magistrate misdirected herself and erred in law and in fact by finding that the Appellant had not filed submissions.
 - b. The learned Magistrate erred in law by misapplying and or ignoring the legal threshold as to what amounts to a Preliminary objection and applicable principles for a preliminary objection.



- c. The learned trial Magistrate erred in law by finding the matter was sub judice yet matters substantially in issue were different.
 - d. The trial Magistrate erred in law and fact in failing to take cognizance of the fact that the Preliminary objection did not raise pure points of law.
 - e. The Ruling of 5th September, 2023 has no legal or factual basis and ought to be set aside.
2. Consequently, the Appellant seeks for the following orders;
- a. The Ruling of Hon. Roseline Oganyo delivered on 5th September, 2023 be set aside.
 - b. The Appeal be allowed with costs.
 - c. This Honorable court be pleased to make such further and other orders as it may deem fit and just in the circumstances of the case.
3. The impugned ruling was in respect of the preliminary objection raised by the 1st Respondent dated 5th July, 2023.

1st Respondent's Notice of preliminary objection

4. The 1st Respondent's Preliminary objection dated 5th July, 2023 was premised on grounds that;
- a. There is a pending suit between the same parties over the same subject pending determination in the Chief Magistrate's Court at Kajjado; ELC Suit No. MCELCE 079 of 2022; Arthur Kahurani Ng'ang'a -v- Reps Consultants Co. Limited and 4 Others where the Plaintiff herein Reps Consultants Co. Limited is the 1st Defendant and which comes up for mention on 10.7.2023 and, therefore the sub judice rule applies.
 - b. The Plaintiff's Notice of Motion dated 26.06.2023 and the entire suit are, therefore, misconceived in law, frivolous, vexatious and amounts to blatant abuse of the court process and should be struck out with costs, ex debito justitiae.

Appellant's Reply to Notice of Preliminary objection

5. The Preliminary objection was opposed by the Appellant through a Replying Affidavit sworn on 25th July, 2023. The deponent deposed that the issues raised and prayers sought in CMCELC E053 of 2023 were different from those in CMCELC E079 of 2022. He asserted that the proceedings in CMCELC E053 of 2023 sought to challenge the findings of the surveyor's report and engender a final legal solution because all the legal issues raised were not considered by the 2nd Respondent whose decision they prayed to be quashed. It also sought to challenge the enforcement of the Registrar's decision on the exercise conducted in June, 2023 which the Appellant was dissatisfied with.
6. The deponent contended that CMCELC E079 of 2022 sought injunctive reliefs and status quo orders pending completion of the survey exercise and boundary delimitation exercise. He further proclaimed that the Preliminary objection did not satisfy the conditions set out in Section 6 of the [*Civil Procedure Act*](#) as the matters directly and substantially in issue in CMCELC E053 of 2023 were not the issues directly and substantially in issue in CMCELC E079 of 2022.

Trial Court's Ruling

7. After considering the Notice of Preliminary objection, the Learned Magistrate through a Ruling delivered on 5/9/2023 upheld the preliminary objection finding that it was merited and proceeded



to strike out the Appellant's entire suit to pave way for hearing and determination of CMCELC No. E079 of 2022.

Directions on the appeal

8. On 3rd March, 2025, this Court directed that the Appeal be disposed of through written submissions. The Appellant duly complied with the directive by filing submissions dated 11th June, 2024 while the 1st Respondent filed submissions dated 5th May, 2025.

Appellants Submission

9. The Appellant cited the provisions of Section 6 of the *Civil Procedure Act* to explain that the sub judice rule is applicable only where the matter in issue in the present suit is directly and substantially in issue in a previously filed suit which was not the case in this instance.
10. It is submitted that the cause of action in CMCELC E053 of 2023 challenges the decision of the land registrar relating to the boundary of the suit property. On the other hand CMELC No. E079 of 2022 seeks compensation on alleged destruction of property. According to the Appellant, the dismissal of its suit left it without an avenue to pursue its legal rights. This is so because the determination of CMCELC E053 of 2023 is intrinsic to its property rights.
11. While making reference to Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Ltd {1969} EA 696, the Appellant maintained that the Preliminary objection did not meet the threshold of a pure point of law. This is because the issue of sub judice is not a pure point of law capable of being raised purely as a Preliminary objection. It is submitted that the learned Magistrate in making her decision did not take into consideration documents, pleadings, facts and evidence in both suits. While imploring the court to set aside the ruling, the Appellant prays that it be awarded the costs of the appeal.

1st Respondent's submission

12. The 1st Respondent submits that the Preliminary objection dated 5th July, 2023 anchored on Section 6 of the *Civil Procedure Act* passed the parameters set out in Mukisa Biscuits case (supra). Counsel for the Respondent argued that the learned Magistrate could not be faulted for making a determination that there was a pending suit between the same parties over the same subject matter before a court of competent jurisdiction. It is further argued that the learned Magistrate must not be faulted for issuing an order striking out the entire suit which offended the sub judice rule. The 1st Respondent urges the court to dismiss the Appeal with costs terming it as unmerited.

Issues for determination

13. Upon critical examination of the Record of Appeal, Memorandum of Appeal and parties' submissions, the issue for determination are;
 - a. Whether the Learned Magistrate erred in determining the issue of sub judice as a preliminary objection; and
 - b. Whether the Reasoning of the trial court supports its ultimate finding on the issue of sub judice.



Analysis and determination

14. This being a first appeal, the court is mandated to re-evaluate the evidence before the trial court as well as the impugned ruling and arrive at its own independent conclusion on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to fresh scrutiny and make conclusions about it.
15. Mativo J (as he then was) in the case of Mursal & another -vs- Manese (suing as the legal administrator of Dalphine Kanini Manese) (Civil Appeal No. E20 of 2021) {2022} KEHC 282 (KLR) (6TH April 2022) (Judgement), had this to say on the responsibilities of a first appellate court,
 - “A first appellate court is mandated to re-evaluate the evidence before the trial court as well as its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand”.
 - i. Whether the Reasoning of the trial court supports its ultimate finding on the issue of sub judice.
16. A preliminary objection as held in the case of Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors Limited (1969) EA;
 - “...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion”.
17. The court in the case of Oraro- vs- Mbaja (2005) eKLR, reiterated that,
 - “...the principle is abundantly clear. A preliminary objection correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed”.
18. The 1st Respondent’s preliminary objection was that the Appellant’s suit was sub judice on the basis that there was a pending suit between the same parties over the same subject pending determination in the Chief Magistrate’s Court at Kajjado being ELC Suit No. MCELC E079 of 2022; Arthur Kahurani Ng’ang’a -v- Reps Consultants Co. Limited and 4 Others where the 1st Appellant herein, Reps Consultants Co. Limited was the 1st Defendant.
19. Section 6 of the *Civil Procedure Act* upon which the learned Magistrate premised her ruling on 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.”



20. For the court to make a determination whether the matter before it was sub judice, it was obligated to establish that there was a previously instituted suit in which the matter in issue is also directly and substantially in issue and proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and that such suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs sought.
21. For the court to establish that, it needed to have been supplied with material evidence about the other suit in form of the pleadings therein in order to confirm the above requirements. That cannot be done by way of a preliminary objection; it would only be possible by way of an ordinary application supported by an affidavit where the material evidence will be attached for the court's consideration.
22. I agree with the holding in the case of Henry Wanyama Khaemba -vs- Standard Chartered Bank Limited & another (2014) eKLR,, where the court was emphatic that one cannot raise the issues of res judicata, duplicity of suits or suits having been spent, by way of a preliminary objection. The court stated that;

“The issues of res judicata, duplicity of suits and suits having been spent will require probing of evidence... They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection”.
23. The best way to raise a ground of res judicata or sub judice as in this case, is by way of a notice of motion where pleadings are annexed to the supporting affidavit to enable the court establish and confirm that the requirements under section 6 of the *Civil Procedure Act* exist.
24. The preliminary objection by the 1st Respondent was therefore improper. The Learned Magistrate erred by proceeding to make a finding on the issue of sub judice without the benefit of looking at the pleadings in the other suit.

ii. Whether the reasoning of the trial court supports its ultimate finding on the issue of sub judice.

25. Section 6 of the *Civil Procedure Act* is instructive that a matter is sub judice where;
 - a. The matter in issue is also directly and substantially in issue in the previously instituted suit;
 - b. The suit is between the same parties or between parties under who they or any of them claim;
 - c. Parties are litigating under the same title; and
 - d. Suit is pending in a court having jurisdiction.
26. The Supreme Court in Kenya National Commission on Human Rights v Attorney General; *Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (Advisory Opinion Reference 1 of 2017)* [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling), discussing ‘sub judice rule’ held as follows;

“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.”

27. Similarly, the Court of Appeal in *Rajab v Kaur* [§ another \(Civil Application E073 of 2023\)](#) [2025] KECA 40 (KLR) (24 January 2025) (Ruling) had this to say about the sub judice rule;

“The doctrine of the sub judice rule arises from the realisation that in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter should be avoided so as to preserve judicial resources in terms of time spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases that the courts have to deal with. However, as the rule states, it is the subsequent suit or proceedings that are to be stayed.

28. I have carefully considered the impugned ruling by the Learned Magistrate delivered on 5th September 2023. The basis of the finding by the court was expressed as follows;

“That there exists ELC No. E079/2022 between the same parties in different capacities over the same subject matter was not disputed by the plaintiff/applicant herein. I therefore find as rightly submitted by the 1st defendant/objector herein that the preliminary objection is on a point of law under Section 6 of the [Civil Procedure Act](#).

Also at paragraph 8 of the plaintiff’s supporting affidavit mention is made of the existence of CMELC No. E079 of 2022 whose conclusion/determination is not given. I therefore find the preliminary objection has merit and I proceed to strike out this entire suit together with all consequential orders so as to pave way for the hearing and final determination of the existing suit CMELC No. E079/2022.”

29. The mere existence of another suit does not render the latter suit sub judice. The Learned Magistrate does not state that issues in the suit before it were directly and substantially in issue in the previous suit. She merely states that “there exists ELC No. E079/2022 between the same parties”. It was on that basis that she proceeded to uphold the preliminary objection by the 1st Defendant. Interestingly, the Learned Magistrate stated that parties were ‘litigating in different capacities’. How then could the latter suit have been sub judice? The finding of the Learned Magistrate does not support her ultimate conclusion that the suit CMCELC E053 of 2023 was sub judice.

30. From the foregoing, this court finds that the appeal herein is merited and hereby sets aside the ruling of Hon. Roseline Oganyo (CM) delivered on 5th September, 2023.

31. The upshot is that the appeal is allowed with costs to be borne by the 1st Respondent.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 24TH DAY OF JULY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mwangi h/b for Mr. Mina for the 1st Respondent

Ms. Thande h/b for Mr. Koskei for the Appellant



Court Assistant: Edwin

M.D. MWANGI

JUDGE

