



**Nguruman Limited v Nielsen & another (Civil Appeal 20 of 2018)
[2023] KECA 274 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 274 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 20 OF 2018
DK MUSINGA, KI LAIBUTA & JM MATIVO, JJA
MARCH 17, 2023**

BETWEEN

NGURUMAN LIMITED APPELLANT

AND

JAN BONDE NIELSEN 1ST RESPONDENT

PETER BONDE NIELSEN 2ND RESPONDENT

(An appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (R. E. Aburili, J.) dated 28th March 2017 in HCCC No. 237 of 2014)

JUDGMENT

1. By a plaint dated 8th August 2014, the appellant (Nguruman Limited), sued the 1st and 2nd respondents (Jan Bonde Nielsen and Peter Bonde Nielsen) jointly and severally claiming: the sum of KShs.109,440,000 or such other sum as the court thought to be reasonable costs of restoring Oldonyo Laro lodge to its previous state; aggravated damages; damages for loss of use of the lodge at the rate of \$250,000 per week from 18th May 2014 until payment of the restoration costs in full; interest on (a), (b) and (c) at such rate, and for such period, as the court thought reasonable; costs of the suit; and any other relief that the court would deem just.
2. The appellant's case was that it is the registered proprietor of the parcel of land known as Narok/ Nguruman/Kamorora/1 on which it had constructed several luxurious lodges, including Oldonyo Laro Lodge; that, by a letter dated 15th June 1999 comprising the management contract in issue, it appointed the 1st respondent to manage the lodge for a term of three (3) years with effect from 1st July 1999 on express terms set out therein; and that the 1st respondent took possession of the lodge complete with eight (8) luxurious raised cottages, a dining cum resting room, a kitchen, a swimming pool complex and resting lounge, an office building, a carpark, labour lines and ancillary buildings.



3. The appellant further averred that, pursuant to the management contract, the 1st respondent erected various structures to the lodge as more particularly specified in paragraph 10 of the plaint; that a dispute arose early in the year 2009 when the appellant learnt that a company known as Oldonyo Laro Estate Limited had occupied the lodge in breach of the terms of the management contract; that the appellant instituted proceedings in the High Court of Kenya at Nakuru in HCCC No 103 of 2009 – *Nguruman Limited v Oldonyo Laro Estate Limited* – seeking eviction of Oldonyo Laro Estate Limited; that the appellant also filed suit in the High Court of Kenya at Nakuru in HCCC No 120 of 2010 – *Nguruman Limited v Jan Bonde Nielsen* – to secure the eviction of the 1st respondent from the lodge, and from every part of the appellant’s property; that, in turn, the 1st respondent filed suit in Nairobi (Milimani) HCCC No 332 of 2010 against the appellant and some of the appellant’s shareholders seeking, inter alia, a declaration that he was the beneficial owner of some shares in the appellant on account of investments made by him in the lodge; that, in addition to the substantive suit, the 1st respondent applied for an interlocutory injunction to restrain the appellant from interfering with his alleged homestead on the suit property; that the injunctive relief was granted as prayed, but subsequently set aside on appeal to this Court in *Civil Appeal No 77 of 2012*; that having lost in the appeal, the respondents allegedly committed waste on the suit property by wilfully and maliciously vandalising, looting and destroying the lodge; and that, as a result, the appellant was put to considerable trouble, inconvenience and expense, and thereby suffered loss and damage.
4. In consequence of the damage complained of, the appellant averred that the lodge was rendered incapable of occupation and operation as an exclusive and luxurious tourist lodge. Hence its claim for damages and the related relief sought.
5. In their defence dated 30th September 2014, the respondents denied the existence of luxuriant lodges developed on the suit property. They stated that there were several cases involving the appellant and the respondents in respect of the suit property; that the 1st respondent was in occupation of the suit property as a partner and not under a management contract, and that he had invested heavily in the property on reliance upon Mr Herman Phillipus Steyn’s (a director of the appellant) promises that they would be partners in a tourism venture; that the development was suspended due to insecurity; that, in 1999, the 1st respondent provided funds to rebuild the lodge; that it was subsequently agreed that the Oldonyo camp and the Nguruman property would from then on be managed by the 2nd respondent through Oldonyo Laro Estates Limited; that the appellant did not suffer any loss as claimed; and that the court had no jurisdiction to hear and determine the appellant’s suit on the grounds that the suit was an abuse of the court process as the issues in question, and the parties in litigation, were similar to those in Nairobi HCCC No 387 of 2014 – *Nguruman Limited v Jan Bonde Nielsen*, Nairobi HCCC No 332 of 2010 – *Jan Bonde Nielsen vs Herman Phillipus Steyne, Miss. Hedda Styne & Nguruman Limited*, Nakuru HCCC No 120 of 2010 – *Nguruman Limited v Jan Bonde Nielsen*, and Nakuru HCCC No 103 of 2009 – *Nguruman Limited v Oldonyo Laro Estate Limited*, all of which are yet to be determined.
6. After Nairobi HCCC No 237 of 2014 – *Nguruman Limited v Jan Bonde Nielsen & Peter Bonde Nielsen* was part-heard, the trial court (R. E. Aburili, J.) took note of the fact that learned counsel for the respondents focused on questions that gave an impression that the suit was either sub judice or res judicata other pending suits or suits which had been fully determined. Accordingly, the court directed that the parties file written submissions for the court to determine the issue of jurisdiction before taking further steps in the matter.



7. Pursuant to the trial court’s directions, parties filed their respective submissions whereupon the court delivered its ruling dated 28th March 2017 directing:
- “ 1. That this matter shall forthwith be stayed pending hearing and determination of HCELC No 103 of 2009 Nakuru.
 2. That each party do bear their own costs of proceedings to this order.
 3. That it is further directed that this file be returned to the Presiding Judge of the High Court Civil Division to take note of the order herein and give appropriate directions more particularly of the mode of tracking of the progress of Nakuru HCELC No 103 of 2009.
 4. That mention on 7th June 2017 before the Presiding Judge Civil Division of the High Court for Directions.”
8. Dissatisfied with the ruling of R. E. Aburili, J. dated 28th March 2017, the appellant moved to this Court on Appeal on the grounds, *inter alia*, that the learned Judge erred in law and in fact: in finding and holding that the matters in issue in the suit are directly and substantially in issue in Nakuru HCELC No 103 of 2009 and that the same was thus ; in failing to apply the principles of *res sub judice* as per section 6 of the [Civil Procedure Act](#); in holding that the issues in Nakuru HCELC No 103 of 2009 must first be determined before the hearing at the superior court could proceed; in Ordering that the said suit be stayed; and in concluding that the parties in Nakuru HCELC No 103 of 2009 and Nairobi HCCC No 237 of 2014 were substantially the same.
9. Learned counsel for the appellant, M/s Ahmednasir, Abdikadir & Company, filed written submissions and a list of authorities dated 29th March 2021 in support of the appeal, citing the cases of [ASL Credit Limited v Abdi Basid Sheikh Ali & Another](#) [2019] eKLR, where the High Court set out the conditions precedent for the principle of *res sub judice* to apply; the Indian Supreme Court decisions in *The National Institute of Mental Health & Neural Sciences v C. Parameshwara* 2005(1) S.C.T. 534; and *Rajinder Aggarwal & Another v K. R. Finmark Pvt. Ltd* 2019 RCR, where the court clarified what was meant by the words “directly and substantially the M/s same” in relation to the principle.
10. Opposing the appeal, learned counsel for the respondents, M/s TJA Associates LLP, filed their written submissions and list of authorities dated 7th June 2022 citing 6 authorities. On the authority of Abok James Odera T/A. [A.J. Odera & Associates v John Patrick Muchira T/A. Muchira & Company Advocates](#) [2013] eKLR and [TOS v Maseno University & 2 Others](#) [2020] eKLR, counsel highlighted the mandate of this Court on first appeal, namely to re-evaluate, re-assess and re-analyse the evidence of the trial court in determination of the appeal.
11. In addition, learned counsel cited the Supreme Court decision in the [Kenya National Commission on Human Rights v the Attorney-General; IEBC & 16 Others \(Interested Parties\)](#) [2020] eKLR submitting that according to the doctrine of *sub judice*, “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.” As to what determines whether a matter is *sub judice*, counsel cited [Republic v Paul Kihara Kariuki, Attorney-General & 2 Others ex parte the Law Society of Kenya](#) [2020] eKLR.
12. On the application of section 6 of the [Civil Procedure Act](#), counsel relied on the cases of [Joel Kenduiywo v District Criminal Investigation Officer, Nandi, & 4 Others](#) [2019] eKLR and [Abdulkadir A. Khalif](#)



v Principal Secretary Ministry of Lands & Physical Planning & 4 Others; NLC & Another (Interested Parties) [2020] eKLR. Section 6 of the *Civil Procedure Act* provides:

“6. Stay of Suit

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.”

13. In *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 Others* [2019] eKLR, the Court of Appeal enunciated the principle behind section 6 of the *Civil Procedure Act* thus:

“Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

14. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR held that:

“(67) 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.”

15. Three issues fall to be determined, namely: whether the suit or issue in Nairobi HCCC No 237 of 2014 is directly and substantially in issue in the former suit, namely Nakuru HCELC No 103 of 2009; secondly, whether the former suit in Nakuru HCELC No 103 of 2009 was between the same parties or parties under whom they or any of them claim in Nairobi HCCC No 237 of 2014; and, thirdly, those parties were litigating under the same title.
16. On the 1st issue, the matters in controversy in Nairobi HCCC No 237 of 2014 relate to alleged wastage, vandalism, destruction and looting on the suit property, for which the appellant claimed general damages, aggravated damages, damages for loss of use, cost of restoration, interest thereon and costs of the suit.



17. On the other hand, in Nakuru HCELC No 103 of 2009, the matters in controversy relate to the alleged trespass on, and occupation of, the suit property, deprivation of the use and enjoyment of the property, and for which the appellant claims mesne profits, general damages and an order for vacation of the suit property, injunctive relief to restrain the defendant and its directors from entering into, occupying, taking possession of or remaining thereon, and from advertising or otherwise claiming proprietorship or shareholding in the suit property, costs of the suit and interest.
18. To our mind, the issues in controversy in the former suit in Nakuru and the latest suit in Nairobi, and the relief sought in the respective suit are directly and substantially different.
19. On the 2nd issue as to whether the earlier suit in Nakuru HCELC No 103 of 2009 was between the same parties or parties under whom they or any of them claim in Nairobi HCCC No 237 of 2014, it is noteworthy that, although the appellant is the plaintiff in both suits, the defendants are different. The defendant in the Nakuru suit is a body corporate, namely Oldonyo Laro Estate Limited, while the defendants in the Nairobi suit are individuals said to be directors of the company aforesaid. In the circumstances, it cannot be said that the parties in both suits are the same.
20. Coming to the 3rd issue as to whether the parties are litigating under the same title, we hasten to answer in the negative. The phrase “same title” was defined in the Indian Supreme Court decision in *Ram Gobinder vs. Bhaktavala* AIR 1971 SC 664 as “the capacity” in which the parties litigate in the two suits. In this regard, the court had this to say:

“The crucial test for determining whether the parties are litigating in a suit under the same title as in the previous suit is of the capacity in which they sued or were sued. The term same title has nothing to do either with the cause of action or with the subject matter of two suits.”

21. In the Nakuru suit, the appellant sued in its capacity as the proprietor of the suit property claiming that the defendant company (Oldonyo Laro Estate Limited) had trespassed on and illegally occupied the suit property while in Nairobi suit, the appellant sued as an employer of the 1st respondent under a management contract. Conversely, the respondents, who were defendants in the Nairobi suit, claimed to have been engaged in a joint venture in tourism business. We need not over emphasize the clear distinction in the capacity under which the parties litigated in the two suits.
22. Having carefully examined the record of appeal, the impugned ruling, the written and oral submissions of learned counsel for the parties and the cited authorities, we find that Nairobi HCCC No 237 of 2014 is by no means *res sub judice* Nakuru HCELC No 103 of 2009 in that the three-fold test for the application of the doctrine of *res sub judice* has not been met. Accordingly, the appeal herein succeeds and, in effect, the ruling and order of the High Court of Kenya at Nairobi (R. E. Aburili, J.) dated 28th March 2017 is hereby set aside. The impugned ruling and order having been made on the court’s own motion, we hereby direct that each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL



J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

