



**Opande v Liverpool Voluntary Counseling & Testing (Cause
E037 of 2022) [2023] KEELRC 1626 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1626 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E037 OF 2022**

**CN BAARI, J
JULY 6, 2023**

BETWEEN

DEOGRATEOUS OKOTH OPANDE CLAIMANT

AND

LIVERPOOL VOLUNTARY COUNSELING & TESTING RESPONDENT

RULING

1. This ruling relates to the Respondent's Preliminary Objection dated February 22, 2023, seeking the striking out of the Claimant's suit on the grounds that it is barred by operations of Section 6 of the *Civil Procedure Act*, or in the alternative, that the suit has been filed in contravention of Section 7 of the *Civil Procedure Act*.
2. The Respondent contends that the Claimant has in his pleadings, admitted that he filed another case being Kisumu CMEELRC Cause No 427 of 2019, between himself and the Respondent on the same cause of action, hence this suit, has been filed in breach of the sub-judice rule, under Section 6 of the *Civil Procedure Act*.
3. It is the position of the Respondent that there is no evidence on record indicating that the claim was either determined and/or dismissed for want of jurisdiction, and no judgment or decree arising from case No 427 of 2019, has been filed as prove that the case has been determined/dismissed for one reason or another.
4. The Claimant in his submission pursuant to the preliminary objection, admitted filing Case No 427 of 2019 involving the same parties before the lower court. It is his position that the matter was then fixed for mention on various occasions culminating in a hearing on October 5, 2021, where both the Claimant's and the Respondent's cases were heard.
5. The Claimant further submitted that a judgment in the matter was delivered on April 5, 2022, when the Trial Court dismissed his suit on the basis that it lacked pecuniary jurisdiction to hear the matter.



6. It is the Claimant's submission that the dismissal did not bar him from filing this suit in a court with competent jurisdiction to hear and determine the suit. He sought to rely in [*Enock Kirao Muhaanji v Hamid Abdalla Mbarak*](#) (2013) eKLR to support this position.

Determination

7. I have carefully considered the preliminary objection together with the submissions by both parties. The issue for determination is whether the suit herein contravenes the sub-judice rule or whether the suit herein is res judicata.
8. Section 6 of the [*Civil Procedure Act*](#) states thus: -
- “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 previous 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.”
9. The Supreme Court in [*Kenya National Human Rights Commission v Attorney General, Independent Electoral & Boundaries Commission & 16 Others*](#) (2020) eKLR, had this to say on the sub-judice rule: -
- “A party that seeks to invoke the decision of the re-subjudice must therefore establish;
1. there is more than one suit over the same subject matter;
 2. one suit was instituted before the other;
 3. both suits are pending before courts of competent jurisdiction; and
 4. the suits are between the same parties or their representatives.”
10. It is not disputed that CMELRC Cause No 427 of 2019 and the instant suit, involve the same parties, the same cause of action and seeks similar reliefs.
11. The Claimant's assertion is that the suit before the lower court was heard and determined resulting in its dismissal on the basis that the suit was beyond the pecuniary jurisdiction of the trial court.
12. The judgment of the lower court has however not been placed before this court as prove that suit was indeed heard to conclusion.
13. The Respondent has not disputed that the suit before the lower court, whether it has been determined or not, is beyond that's Court's pecuniary jurisdiction premised on the Claimant's gross salary, and the delegation given to the Magistrates Court on employment matters.
14. In my view, and going by the provisions of Section 6 of the [*Civil Procedure Act*](#), a suit only violates the re-sub-judice rule, when two or more cases are filed over the same subject matter, between the same parties and before courts with competent jurisdiction.
15. This goes to say, that the fact that the lower court did not have jurisdiction over CMELRC Cause No 427 of 2019, is in itself confirmation that the suit herein does not violate the sub-judice rule and the existence of that suit is not sufficient ground to strike out or dismiss the instant suit.
16. Consequently, I hold that the suit herein does not offend the sub-judice rule.



Whether the Suit is *Res Judicata*

17. Section 7 of the [Civil Procedure Act](#) states thus: -

“No Court shall try any suit or issue in which the matter directly in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigation under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

18. The Court in [Pangaea Holdings LLC & another v Hacienda Development Ltd & 2 others](#) [2020] eKLR held that matters are meant to come to finality and which is the rationale for Section 7 of the [Civil Procedure Act](#).

19. For a matter to be considered res judicata, the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.

20. The Court of Appeal pronounced itself on Section 7 of the [Civil Procedure Act](#), in the case of [Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others](#) (2017) eKLR where it set out the elements that must be satisfied for the bar of res judicata to be effectively raised and upheld in the following words:

- a. the suit or issue was directly and subsequently in issue in the former suit.
- b. the former suit was between the same parties or parties under whom they or any of them claim.
- c. those parties were litigating under the same title
- d. the issue was heard and finally determined in the former suit.
- e. the court that formally heard and determined the issue was competent to try the subsequent suit in which the issue is raised.”

21. The Claimant does not deny that the matter herein involves the same parties and similar issues. Whether the Suit was dismissed or still pends in the lower Court, it is clear that the lower court is not competent to try the matter premised on its pecuniary jurisdiction.

22. I thus find and hold that the Respondent’s preliminary objection does not meet the threshold to hold the Claimant’s suit as either being res judicata or in violation of the sub-judice rule.

23. The preliminary objection is dismissed with costs to the Claimant.

24. Orders of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JULY, 2023.

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant



Mr. Achillah present for the Respondent

Ms. Christine Omolo-C/A

