



REPUBLIC OF KENYA



**Waweru & another v Maina (Civil Appeal E961 of 2022)  
[2025] KEHC 11648 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11648 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E961 OF 2022**

**REA OUGO, J**

**JULY 31, 2025**

**BETWEEN**

**JAMES WAWERU ..... 1<sup>ST</sup> APPELLANT**

**WINROSE MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RUO MAINA ..... RESPONDENT**

*(An appeal from the ruling and order of Senior Resident Magistrate's Court at Nairobi (M.W. Murage, SRM.) delivered on 14th November 2022 in CMCC No.E1258 of 2021)*

**JUDGMENT**

1. By a plaint dated 16<sup>th</sup> August 2021, the appellants filed Nairobi CMCC No. E1258 of 2021 over a dispute arising out of rent arrears. The respondent entered appearance and filed a notice of preliminary objection dated 28<sup>th</sup> October 2021. The respondent urged the trial court to strike out the suit with costs for offending section 6 of the *Civil Procedure Act*. He explained that there is another suit pending in court for determination between the same parties over the same subject matter in CMCC No. E3694 of 2020.
2. The preliminary objection was dealt with first. The parties chose to address the issues through written submissions. In a ruling dated 14th November 2022, M.W. Murage (SRM) found that the preliminary objection was justified. Accordingly, the suit Nairobi CMCC No. E1258 of 2021 was struck out with costs awarded to the respondent. It is these findings that have led to the present appeal.
3. The appellants submitted their memorandum of appeal dated 21st November 2022, which raised seven grounds challenging the findings of the learned magistrate. In brief, the trial magistrate's conclusions were flawed because she did not establish that Nairobi CMCC No. E1258 of 2021 and Nairobi CMCC



No. E3694 of 2020 were entirely different. The appellants clarified that in Nairobi, CMCC No. E1258 of 2021, the plaintiffs claimed special damages of Kshs. 1,148,539.00, whereas in Nairobi CMCC No. E3694 of 2020, the plaintiff sought injunctive orders to prevent the levying of distress.

4. They also stated that in Nairobi CMCC No. E3694 of 2020, the respondent had since vacated the suit premises, and therefore, the suit was already overtaken by events. For that reason, the facts were distinguishable from the present dispute, as the subject matter is still ongoing. They lamented that the court in Nairobi CMCC No. E3694 of 2020 struck out their counterclaim. They added that the dismissal of the preliminary objection resulted in the appellants being unable to enjoy the rights outlined in Article 48 of *the Constitution*. In their view, the learned magistrate should have consolidated the two matters. Accordingly, the appellants submitted that the appeal should be allowed with costs.
5. This appeal was canvassed through written submissions. The appellants submitted their joint written submissions dated 15th January 2024, together with a list of authorities. They contended that the test for res sub judice was not satisfied, as Nairobi CMCC No. E3694 of 2020 and Nairobi CMCC No. E1258 of 2021 involved separate and distinguishable disputes. Referring to the prayers in the primary pleadings, the appellants highlighted that in Nairobi CMCC No. E3694 of 2020, the respondent sought injunctive relief against the appellants; whereas, in Nairobi CMCC No. E1258 of 2021, the appellants sought Kshs. 1,148,539.00 in special damages. They further argued that the respondent vacated the suit premises on 16th August 2020, rendering the earlier suit spent. They asserted that since their counterclaim was struck out on 17th June 2021 in Nairobi CMCC No. E3694 of 2020 due to the filing of a new suit, they were entitled to initiate a fresh suit against the respondent.
6. Alternatively, the appellants argued that the trial court should have preferred to retain the suit rather than dismissing it and instead stayed the proceedings. They requested that their constitutional right to be heard be upheld by reinstating the suit for hearing and determination. They urged this court to stay the suit, namely, Nairobi CMCC No. E1258 of 2021, pending the outcome of Nairobi CMCC No. E3694 of 2020, with strict timelines for prosecuting the matter.
7. The respondent opposed the appeal. He submitted written arguments dated 15th April 2024, which appear to be an affidavit on face value, as they were sworn at the jurat section. He argued that the appeal was without merit and should be dismissed because the allegations made were not supported by documentary evidence. He maintained that the findings of the learned magistrate were appropriate since a res sub judice was in place. He also argued that the appellant was wasting the court's valuable judicial time. For example, he questioned why the appellants had not challenged the findings dismissing the counterclaim.
8. The respondent summarised the facts leading to the dispute, submitting that the claim raised by the appellants in Nairobi CMCC No. E1258 of 2021 was not made in good faith, as it was baseless and arose from a dispute of a personal nature. In any case, the subject suit was vigorously contested. He argued that the appellants' counterclaim was properly struck out to prevent apparent unfairness, blatant conduct, and ongoing abuse of the court's process.

### **Analysis and Determination**

9. I have considered the memorandum of appeal and the parties' rival written submissions. I have also examined the record of appeal and analysed the law. Being the first appeal, the duty of this court is to analyse the evidence afresh, re-evaluate it, and arrive at our own independent conclusion. I must bear in mind that the trial court had the advantage of hearing the witnesses testify and observing their demeanor.



10. The appellants have urged this court to re-examine the decisions of the learned magistrate, which dismissed Nairobi CMCC No. E1258 of 2021 for violating section 6 of the *Civil Procedure Act*, which states:

“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.”

11. The basis for the enactment of section 6 of the *Civil Procedure Act* is to be found in the case of *Bundotich vs. Managing Director, Kenya Airways Authority and Another* (2007)2 E.A 90 that held as follows:

“The issue at the core of both this suit and the other suit was the ownership of the land reference number 209/14824. Obviously, if the plaintiff succeeded in the other suit the plaintiff herein would have no leg to stand on. If that issue were to be dealt with before the two courts, at the same time, there is every possibility that the courts could reach inconsistent verdicts. If that were to happen the courts would have been put into disrepute. Meanwhile, if the two cases were left to run side by side in two different courts that would be a waste of precious judicial time. In order to ensure that judicial time is utilized in an optimum manner and also to safeguard the integrity of the judiciary, by removing the possibility that two court's of concurrent jurisdiction might arrive at inconsistent decisions on the same subject matter, this suit should be struck out.”

12. During the hearing of the preliminary objection, the appellants acknowledged that as defendants in Nairobi CMCC No. E3694 of 2020, they filed a defence and counterclaim dated 3rd September 2020, seeking Kshs. 1,148,539.00 for rent arrears, utility bills, and renovation costs. The respondent, who is the plaintiff in Nairobi CMCC No. E3694 of 2020, successfully applied to have the counterclaim struck out due to failure to file a Verifying Affidavit.
13. The provisions of section 6 of the *Civil Procedure Act* specify that, for a party to succeed in a claim, they must establish that the matter is directly and substantially in issue. Admittedly, the appellants' counterclaim was struck out on 17th June 2021 on technical grounds. In other words, the appellants' claim will not be heard in Nairobi CMCC No. E3694 of 2020. In my view, the claim by the appellants in that dispute is not directly and substantially in issue, as they are no longer active parties.
14. This court acknowledges that the parties are similar. However, they are litigating under different titles. It is also clear that the plaintiff, who is the respondent herein, is seeking injunctive orders against the appellants' exercise of distress in Nairobi CMCC No. E3694 of 2020. In Nairobi CMCC No. E1258 of 2021, the appellants are seeking special damages for rent arrears, utility bills, and renovation costs. I find that the two issues are distinct. I am of the opinion that there is no need for two courts to issue contradictory decisions. Nonetheless, the two matters can be consolidated to serve the interests of justice.
15. In light of my foregoing analysis, I make the following orders:
1. The ruling dated 14<sup>th</sup> November 2022 be and is hereby set aside;
  2. Nairobi CMCC No. E1258 of 2021 is hereby reinstated;



3. Parties to explore the possibility of consolidating the two matters that is Nairobi CMCC No. E1258 of 2021 and Nairobi CMCC No. E3694 of 2020;
4. Since the parties are family friends, I direct each party to bear its own costs of the appeal.

**DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 31<sup>ST</sup> DAY JULY 2025.**

**R.E. OUGO**

**JUDGE**

In the presence;

Miss Ngunyi h/b Miss Okulo For the Appellants

Respondent - Absent

Wilkister - C/A

