



Kuguru Food Complex Ltd v National Youth Service & 2 others (Civil Appeal E884 of 2022) [2024] KEHC 6123 (KLR) (Commercial and Tax) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E884 OF 2022**

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

KUGURU FOOD COMPLEX LTD APPELLANT

AND

NATIONAL YOUTH SERVICE 1ST RESPONDENT

KENYA PIPELINE CO LTD 2ND RESPONDENT

KENYA RAILWAYS CORPORATION 3RD RESPONDENT

((Being an appeal from the Ruling of Hon. L.B Koech Principal Magistrate in Nairobi CMCC No 1891 of 2018 delivered on 24th October 2022))

JUDGMENT

1. The appellant in a plaint dated 15th March 2018 sued the respondents seeking a permanent injunction stopping them from interfering with its peaceful enjoyment of land reference no. L.R. No. 209/14687. The appellant also sought general and punitive damages against the respondents for trespass, destruction and illegal invasion of the suit premises together with costs of the suit. The 2nd respondent filed a defence challenging the court's jurisdiction. It also filed a notice of motion dated 3rd February 2020 seeking to have the appellant's suit struck out terming it sub judice in light of the pre-existing Nairobi ELC case No. 589 of 2010. It also filed a notice of preliminary objection dated 30th March 2022 still challenging the jurisdiction of the Court.
2. The learned magistrate in the impugned ruling allowed both the notice of motion and the preliminary objection raised by the 2nd respondent hence striking out the appellant's suit with costs. The appellant



being dissatisfied with the impugned ruling filed the Appeal dated 28th October, 2022 on the following grounds:

- i. That the learned magistrate erred in law in fact in finding that the set of facts and issues in dispute in ELC 589 of 2010-*Kuguru Food Company Complex vs. Kenya Pipeline and CMCC No. 1891-Kuguru Food Complex Ltd vs. National Youth Service, Kenya Pipeline Co. Ltd & Kenya Railways Corporation* the present case are similar and thus that the latter is barred because it offends sub judice;
 - ii. That the learned magistrate erred in law and in fact in considering the value of subject property was relevant in determining the pecuniary jurisdiction of the Court to hear and determine the appellant's suit;
 - iii. That the learned magistrate erred in law and in fact by finding that it does not have the requisite jurisdiction to hear and determine the appellant's suit instituted vide the plaint dated 15th March 2018;
 - iv. That the learned magistrate erred in law and in fact in making a ruling against the appellant and striking out the suit instituted vide plaint dated 15th March 2018;
3. This appeal was canvassed by way of written submissions. The firm of Igeria & Ngugi Advocates filed submissions dated 29th January 2024 urging the appellant's case. In urging the first and fourth grounds of appeal, counsel submitted that while the present case concerned trespass and unlawful entry into the appellant's property by the respondents, the earlier suit concerned only the 2nd respondent hence the present suit could not be barred for being sub judice. To buttress the submissions on this point, counsel referred to the cases of *Republic vs. Commissioner of Domestic Taxes: Panalphina Airflo Ltd (Ex Parte)* (2019) eKLR and *ASL credit Ltd vs. Abdi Basid Sheikh Ali & Another* (2019) eKLR and submitted that the parties and the subject matter were different between the two suits hence the present case cannot be barred under the sub judice, rule.
 4. Turning to the second and fourth grounds of appeal, counsel urged that the learned magistrate ought to have relied on the possible award for damages in assessing the Court's pecuniary jurisdiction. According to counsel, an award for general damages would not have exceeded the maximum pecuniary jurisdiction for the learned Magistrate hence the Court had jurisdiction to determine the suit. It was counsel's final submission that the appeal had merit and should be allowed in its entirety.
 5. For the 2nd respondent, the firm of JKIWINGA & Co. Advocates filed submissions dated 5th February 2024. Therein, counsel addressed two issues. Regarding the doctrine of sub judice, counsel submitted that the motion by the 2nd respondent satisfied the three conditions set *Kiwari PLC vs. Principal Land Registration Officer Ministry of Lands and Physical Planning & 6 Others* (2021) eKLR. According to counsel, the trial court properly addressed its mind to the application and arrived at a legally sound and backed conclusion that the present suit was barred by sub judice.
 6. Turning to the issue of jurisdiction, counsel submitted that the subject matter of the suit was beyond the maximum statutory awards allowed for the trial court. According to him, the value of the property remained the basis upon which the court could assess its jurisdiction as opposed to an award of damages even where the appellant failed to attach the damage assessment report save for a valuation report. Counsel also pointed out that the appellant sought a declaration of ownership of the suit property



hence calling for the court determine who owned the whole property which was valued at Kshs. 580,000,000/= In the end, counsel urged that the appeal be dismissed with costs.

7. The 1st and 3rd respondent did not participate in the Appeal.

Analysis and Determination

8. This being a first appeal, this court is mandated to examine the matter at hand in the context of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny prior to drawing a conclusion. This is the position adopted by the Court including in *Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

Also see *Selle & another V Associated Motor Boat & others* [1968] E. A 123.

9. Having addressed my mind to the grounds of appeal, record of appeal as well as the submissions by both parties, I find two issues arising for determination. First, is whether the appellant’s suit was barred for being sub judice. And second, whether the learned magistrate lacked jurisdiction to determine the suit.
10. Starting with the issue of sub judice, section 6 of the *Civil Procedure Act* provides 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.”

11. The Supreme Court in *Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [202] eKLR) had an opportunity to render itself on the issue of sub judice and stated 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.” (Emphasis mine)

12. From the foregoing, it is imperative that I subject the notice of motion dated 3rd February 2020 to the three-tier test as established by the Supreme Court above. Having gone through the motion and the annexures, it is evidently clear that both ELC 589 of 2010-*Kuguru Food Company Complex vs. Kenya*



Pipeline and CMCC No. 1891 of 2018 - Kuguru Food Complex Ltd vs. National Youth Service, Kenya Pipeline Co. Ltd & Kenya Railways Corporation concerns land reference no. L.R. No. 209/14687. It is also clear that ELC 589 of 2010-Kuguru Food Company Complex vs. Kenya Pipeline was lodged before CMCC No. 1891 of 2018 - Kuguru Food Complex Ltd vs. National Youth Service, Kenya Pipeline Co. Ltd & Kenya Railways Corporation and that both cases were still alive within the judicial pipeline. Even though the appellant has argued that the cause of action leading to the two different suits are different having occurred 8 years apart, the two cases find convergence in the reliefs sought.

13. Furthermore, the 2nd respondent, from the face of the record, seems to be the primary party in both suits and from whom the permanent injunction is sought. The appellant cannot therefore hide behind the inclusion of the 1st and 3rd respondents to evade the strappings of sub judice. The Supreme Court in John Florence Maritime Services Limited & another v. Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) urged Courts to be vigilant and warned against this practice thus:

“In the case of Omondi v National Bank of Kenya Limited and others, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’”

14. In my view, the notice of motion dated 3rd February 2020 passes the three-tier test as established by the Supreme Court. I do not therefore find any impropriety on the part of the trial Court in finding that CMCC No. 1891-Kuguru Food Complex Ltd vs. National Youth Service, Kenya Pipeline Co. Ltd & Kenya Railways Corporation is barred by sub judice.
15. Turning to the preliminary objection raised in relation to the trial Court’s jurisdiction, the starting point is section 7 of the Magistrate Courts Act which provides as follows:

- “(1) A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
- (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate.”

16. In Samuel Kamau Macharia & another vs. KCB Ltd and another (2012) eKLR the Supreme Court of Kenya held that a court could not arrogate to itself jurisdiction exceeding what was conferred by statute. In this case, the parties are at a crossroads. While the appellant argues that the jurisdiction, in this case, was subject to awardable general damages, the respondent argues that jurisdiction should be



subject to the value of the suit property, in this case, land reference no. L.R. No. 209/14687 which at the time was valued at Kshs. 580,000,000.

17. Jurisdictional views as held by the parties herein would apply albeit in different circumstances. In *Joseph Karisa Katsoma & 3 Others vs. Samuel Charo Marabu* [2005] eKLR where the applicants claimed vacant possession and permanent injunction against the respondent, among other reliefs, the Court relied on the value of the suit property to ascertain the pecuniary jurisdiction of the trial Court. On the other hand, in *Joseph Muthee Kamau & another v David Mwangi Gichuru & Another* [2013]eKLR, the Court stated thus:

“The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction. However, this does not apply to the present case in a claim for general damages where it is the respondents who appointed, through their own assessment, what the amount of damages they would claim. The respondents are permitted to limit the amount of general and special damages they would like to claim in order to bring themselves within the pecuniary jurisdiction of a particular court. The decision of Justice J.B. Ojwang in *Armitral Bagwanji Shah v Mash Express Ltd & Others* (Nairobi HCCC 1095 of 2005 (Unreported)) is in accord.”

18. What I understand of the views held in *Joseph Muthee Kamau & another v David Mwangi Gichuru & Another* [2013]eKLR is that in instances where the amount of damages is ascertainable, the Court can assume jurisdiction based on the pleaded amount of damages. However, in this case, the appellant did not plead the amount of damages he sought as compensation. He presumably sought general damages subject to the upper limit of the Court’s pecuniary jurisdictional. In my view, if the only relief sought was for an award of general damages, then such a presumption of jurisdiction would be convincing.
19. In this case, it is evidently clear that the question of ownership of the suit property was raised. A permanent injunction and a finding of trespass cannot be made without delving into who owns the suit property. The ownership of the suit property being a live question calling for the Court’s determination, it followed that the question would be entertaining a suit in respect of a property worth kshs. 580,000,000/=. That being the case, the proper approach to the question of jurisdiction would be as envisioned in *Joseph Karisa Katsoma & 3 Others vs. Samuel Charo Marabu* [2005] eKLR. In the circumstances, I do not find any error on the part of the learned magistrate in finding that the court lacked jurisdiction. Moreover, the issue of ownership of the suit property is the subject before the ELC in ELC No. 589/2010.
20. The appellant’s suit therefore having been struck by the double misfortune of sub judice and lack of pecuniary jurisdiction, the trial Court had no recourse but to strike out the suit. Transfer of the suit as suggested by the counsel for the appellant would serve no purpose as the same is only available where the suit is not barred by sub judice. Similarly, staying the suit is only available where the Court has jurisdiction but the same is barred by sub judice. Even so, staying a suit and keeping it within the judicial pipeline would result in congestion of the system with a case that would finally be dealt a blow by being res judicata. The end result is that the present appeal lacks merit.
21. Turning to the question of costs, ordinarily, costs follow the event and are at the discretion of the court. This court can only depart from that norm if sufficient reasons are advanced to warrant a departure thereof. I find no sufficient reasons advanced. The 2nd respondent shall have the cost of this appeal.
22. The upshot is that this appeal is hereby dismissed for lack of merit with costs to the 2nd respondent.
23. Orders accordingly



DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

