



Saif Said Saif Al Busaidy as Trustee of Seif Bin Salim Trust v Pirani & 3 others (Environment & Land Case 132 of 2022) [2023] KEELC 16388 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 132 OF 2022
NA MATHEKA, J
MARCH 22, 2023**

BETWEEN

**SAIF SAID SAIF AL BUSAIDY AS TRUSTEE OF SEIF BIN SALIM
TRUST PLAINTIFF**

AND

**SHAMIM SHAKIR PIRANI 1ST DEFENDANT
JAMIL SHAKIR PIRANI 2ND DEFENDANT
IMRAN SHAKIR PIRANI 3RD DEFENDANT
ABBSAKI INVESTMENTS LTD 4TH DEFENDANT**

RULING

1. The defendants raised a preliminary objection for determination in limine and seek to have the entire suit struck out/dismissed for the following reasons;
 - a. That this honorable court has no jurisdiction to entertain this suit as it offends the mandatory provisions of section 6 of the *Civil Procedure Act*, cap 21.
 - b. That there is a pending suit filed by the defendants against the Plaintiff over the same subject matter being HC ELC No. E127 of 2022, Shamim Shakir Pirani & 3 others -vs-Saif Said Saif Al Busaidy as Trustee of Seif Bin Salim Trust and which is pending determination.
 - c. That this suit be dismissed with costs.
2. The defendants submitted that this suit is sub judice as there is a pending suit filed by the defendants against the plaintiff over the same subject matter being HC ELC No. E127 of 2022, Shamim Shakir Pirani & 3 others -vs- Saif Said Saif Al Busaidy as Trustee of Seif Bin Salim Trust and which is pending determination. That this honorable court should not entertain the issue of consolidation of the two



suits as this is a clear abuse of court process. Furthermore, if the same is done, the defendant herein will be denied costs as he has already instructed Counsel who entered appearance and filed defense.

3. The plaintiffs submitted that the two claims were filed simultaneously, unintentionally and unknown to the respondent. The two suits are before the same court and can be consolidated and disposed of expeditiously. That consolidation would further the oxygen principles and overriding objectives of this court. It is on record that the respondent is the one that took the initiative to set down this matter for directions together with MSA ELC No. 127 of 2022. The two suits relate to the same property, similar parties and arise from the same series of events thus capable of consolidation. Striking out this claim would severely prejudice the respondent whilst the applicant stands to suffer no prejudice if the two suits are consolidated. In event that the court finds that it must strike out the suit, then they pray that it does not the respondent to pay costs and that each party to bear its costs since the circumstances of the present duplicity of the cases was unintentional.
4. This court has considered the preliminary objection and the submissions herein. A preliminary objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* (1969) E.A 696,

“ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“ A Preliminary Objection 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

5. J.B. Ojwang, J (as he then was) in the case of *Oraro v Mbajja* (2005) e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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 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. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

6. The issue as to whether or not this suit is subjudice is therefore properly raised as a preliminary objection and the court will consider the same. Section 6 and 7 of the *Civil Procedure Act* cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”



Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating 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.”

7. The defendants submitted that this suit is sub judice as there is a pending suit filed by the defendants against the plaintiff over the same subject matter being HC ELC No. E127 of 2022, Shamim Shakir Pirani & 3 others -vs- Saif Said Saif Al Busaidy as Trustee of Seif Bin Salim Trust and which is pending determination. I have perused the court records and find that the defendants filed HC ELC NO. E127 OF 2022, Shamim Shakir Pirani & 3 others -vs-Saif Said Saif Al BusaidY as Trustee of Seif Bin Salim Trust on the November 9, 2022which the subject matter is Mombasa/Block XX/192 and the plaintiff entered appearance on November 15, 2022. On the December 6, 2022the plaintiff herein filed the instant suit. I find that the plaintiff was well aware of the existence of the earlier suit. Filing this suit was an abuse of the court process. I find the preliminary objection is merited and I strike out this suit with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

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