



**Oiyie v Oiyie (Environment and Land Miscellaneous Application
E012 of 2022) [2023] KEELC 16901 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E012 OF 2022**

**CG MBOGO, J
APRIL 25, 2023**

BETWEEN

PHYLLIS WANGUI OIYIE APPLICANT

AND

MARY WANGUI OIYIE RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion application dated November 18, 2022 and a notice of Preliminary Objection dated January 24, 2023. The Notice of Motion is expressed to be brought under Sections 152A, 152B, 152E, 152G and 152F of the [Land Laws \(Amendment\) Act](#) (sic) seeking the following orders:-
 1. Spent
 2. That the eviction notice be and is hereby approved in its entirety as attached by having the respondent Mary Wangui Oiyie give vacant possession of the property known as Plot No 160 Block 2 Narok Town (near chief's offices) and plot No 226 Block 6 Narok Town (Lenana Estates) to Phyllis Wangui Oiyie, the applicant.
 3. That the OCS Narok Police Station, Narok do offer security in ensuring compliance of prayer 2 above.
 4. That the costs of this application be provided for.
2. The application is premised on the ground on the face of it and in the supporting affidavit of the applicant herein.
3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that she is the registered and absolute owner of parcels of land known as plot No 160 block 2 Narok town near the chief's offices and plot No 226 block 6 Narok town in Lenana estate and which



she was allocated the same properties by the then Narok Town Council on June 7, 1999 and December 23, 2008 respectively.

4. The applicant further deposed that she has developed the said properties and utilized them until the respondent came and has since not been able to access the same as the respondent claimed ownership and that efforts to move her from the land have proved futile.
5. The applicant deposed that as required and provided for by law, she served the eviction notice upon the respondent, the National Police Service and the County Commissioner which was to take effect on October 3, 2022. In addition, that since serving the eviction notice, the respondent has not filed or served any form of application or order opposing the eviction notice and therefore requires authorization from this court.
6. Finally, the applicant deposed that the respondent's continued occupation of the suit properties is subjecting her to losses, crippling her business and infringing on her constitutional right to occupation, enjoyment and use of her properties.
7. The application is opposed by the replying affidavit of the respondent sworn on January 24, 2023. The respondent deposed that Section 52E of the Land Act does not apply in these proceedings in view of the fact that the suit properties were allocated to her by the court and no notice has been served upon her by the applicant as is alleged.
8. In addition, that the applicant has not come to court with clean hands and is guilty of engaging in a multiplicity of suits in an attempt to unjustly deny her and her children the right to a share of her late husband's estate which has already been distributed by a court of competent jurisdiction.
9. The respondent further deposed that the applicant has been litigating over the same matter from the year 1998 and in the High Court vide Succession Cause No 281 of 2006 and Succession Cause No 14 of 2017 which was subjected to a lengthy litigation. Further, that in Narok Succession Cause No 14 of 2017, the applicant being dissatisfied with the orders of Justice J.M. Bwonwonga, lodged an appeal at the Court of Appeal vide Civil Appeal No 55 of 2021 which is pending and yet to be prosecuted.
10. Further, that both properties were allocated to her by the court and the court orders are still in force and that the applicant having realized that the appeal is likely to fail has devised other tactics in a desperate attempt to reclaim ownership of the suit properties through the back door with intentions of circumventing the cause of justice contrary to Article 40 (2) of the Constitution. In conclusion, that issues involving the suit properties have been tried and determined by a competent court and the same is a subject of appeal which cannot be re-litigated in this forum.
11. The respondent filed a notice of preliminary objection dated January 24, 2023 objecting to the instant application on the following grounds:-
 1. That the said application is not only frivolous, vexatious, misconceived, incompetent and abuse of the court process but the same is also bad in law, an afterthought and lacking in merit.
 2. The said application offends the mandatory provisions of the Civil Procedure Rules.
 3. The applicant has lodged an appeal at the Nakuru Court of Appeal challenging orders issued by the court in HC Succession Cause No 14 of 2017 at Nakuru involving the subject matter of the application herein to wit, Plot No 160 Block 2 Narok Town and Plot No 226 Block 6 Narok Town.
 4. The applicant is attempting to relitigate over an issue which has already been tried and concluded by a court of competent jurisdiction.



12. This court directed that both the application and the notice of preliminary objection be canvassed by way of written submissions.
13. The applicant filed written submissions dated March 8, 2023. The applicant submitted that the respondent has not sought to call the process server for cross examination on the service of the eviction notice as was decided in *Amayi Okumu Kasiaka & Others v Moses Okware Opari & Another*, Civil Appeal No 15 of 2010. The applicant further submitted that the respondent invaded the applicant's parcel of land even though it is clear that the parcels are totally different from what she was granted.
14. Further that the appeal as duly filed relates to the distribution of the properties belonging to the deceased while the eviction is in relation to the properties belonging to the applicant which the respondent illegally occupies and which is a non-issue in relation to the succession cause.
15. With regard to the notice of preliminary objection, the applicant submitted that the grounds raised by the applicant have to be heard for the court to determine the suit on merit. The applicant relied on the case of *Gladys Pereruan v Betty Chepkorir* [2020] eKLR and submitted that the suit (sic) herein is weighty and raises relevant issues that should be heard on merit.
16. The applicant concluded by submitting that what the respondent was awarded by the court is not affected by the eviction and in any event, the respondent needs to find the plots she claims and allow the applicant quiet possession of what is rightfully hers.
17. The respondent filed written submissions dated February 28, 2023 and raised one issue for determination which is whether the application has merit.
18. The respondent submitted that the application before this court, seeks orders whose subject matter is pending before the Court of Appeal in Nakuru, and, that the order and certificate of confirmation issued by Kimaru J (as he then was) is supposed to be the status quo since the order has not been vacated nor stayed. Also, that the respondent has been in continuous occupation of plot No 160 block 2 since March, 2014 when she was legally allocated the same by the court. The respondent further submitted that the applicant failed to disclose to this court material facts while seeking an equitable remedy. The respondent relied on the case of *Halima Haji Sarah v Multiple Hauliers (E.A) Limited & Another* [2022] eKLR.
19. The respondent further submitted that the suit properties were allocated to her by Kimaru J (as he then was) vide a certificate of confirmation of grant dated March 11, 2014 and there is no order which has been issued which varies or sets aside the said orders. The respondent submitted that in this case, the instant application is sub judice. The respondent relied on the cases of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)* [2020] eKLR and *Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya* [2020] eKLR.
20. The respondent filed further written submissions dated March 21, 2023. The respondent buttressed the issues in the initial written submissions filed and submitted that both properties are the subject of Nakuru Civil Appeal No 55 of 2021.
21. I have considered the application and the preliminary objection and the issues for determination are whether the application has merit and whether the notice of preliminary objection ought to be upheld.



22. I will begin with the notice of preliminary objection. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: - Per Law JA (as he then was)

“So far as I am aware, a Preliminary Objection 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

23. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

24. It is also this court’s opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No53 of 2004, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

25. Before I embark on determining the merits of the preliminary objection, this court has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the court determines whether what the respondent has filed amounts to a preliminary objection or not, the court will also be persuaded by the findings in the case of *Oraro v Mbaja* (2005) 1KLR 141, where the court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

26. In this case, the respondent raised four grounds in her preliminary objection. In my view, the ground that commends itself for consideration in a preliminary objection is ground three which in my view, to a large extent captures all the other grounds raised therein.



27. It was the respondent's averments that the subject matter in the instant applicant is similar before the Court of Appeal in Nakuru vide Civil Appeal Number 55 of 2021 and which involves the same parties. The respondent relied on a certificate of confirmation of grant dated March 11, 2014, decree dated October 28, 2020, a court order issued on July 19, 2021, a Memorandum of Appeal dated July 15, 2021 amongst other documents.
28. The applicant on the other hand, submitted in paragraph 18 of her written submissions that the appeal as duly filed relates to the distribution of the property belonging to the deceased estate, while the eviction herein is in relation to properties belonging to her which the respondent illegally occupies.
29. In her application, the applicant sought for eviction orders against the respondent over the properties known as plot No 160 block 2, Narok town near the chief's offices and plot No 226 block 6 Narok Town in Lenana estate. The grounds in the application are that the respondent was served with the notice of eviction and since the respondent has not filed any reference or any application of objection, then this court ought to grant the orders of eviction. The applicant supported her claim with copies of allotment letters, receipts of payments, copy of decree issued on October 28, 2020 and a copy of the eviction notice.
30. The respondent termed the instant application as one amounting to sub judice owing to the fact that there exists an appeal that is pending hearing and determination before the Court of Appeal in Nakuru.
31. Section 6 of the *Civil Procedure Act* provides as follows on the issue of sub judice:
- “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.”
32. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR 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.”
33. While I place reliance on the above cited authority, it cannot be denied that the subject matter in this application is the subject matter in the memorandum of appeal since both refer to the suit properties plot number 160 block 2 and plot number 226 block 6. The comparison is that the instant application is seeking eviction while the appeal seeks variation of the ruling and orders of the High Court issued on February 11, 2021. Most notable is that the memorandum of appeal was filed earlier than the instant



application and in the absence of any withdrawal of the appeal by the applicant, this court is unable to proceed with the determination of the application.

34. I will also point out that the applicant herein also intentionally failed to disclose to this court the existence of the pending appeal and which in my view amounts to abuse of court process. This court will not waste its precious judicial time and resources to determine the application.
35. Arising from the above, it is my finding that the notice of preliminary objection dated January 24, 2023 has merit and it is hereby upheld. The notice of motion application dated November 18, 2022 is dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 25TH DAY OF APRIL, 2023.

MBOGO C.G.

JUDGE

25/4/2023

In the presence of:

CA:Chuma

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