



**Malika & another v Bidii International Company Ltd & another (Petition  
16 of 2022) [2023] KEHC 26161 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26161 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
PETITION 16 OF 2022  
DK KEMEL, J  
NOVEMBER 30, 2023**

**BETWEEN**

**CATHERINE AYUMA MALIKA ..... 1<sup>ST</sup> PETITIONER**

**HEZEKIAH FRANCIS MALIKA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**BIDII INTERNATIONAL COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**MILE HIGH ENTERPRISES LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Motion Application pursuant to section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, order 2 rule 15 and order 51 rule 1 of the *Civil Procedure Rules*, dated 9<sup>th</sup> August 2023 and filed on 16<sup>th</sup> August 2023 by the Respondents herein respectively, seeking an order be issued striking out the present petition against the Respondents with costs as the same is sub-judice, frivolous, vexatious and an abuse of the Court process; and that the costs of this application be granted.
2. The application is supported by the affidavit of Kennedy Mukhwana Ambundo, Director and Chairman of both the Respondents, sworn on even date wherein he deposed that the present suit is similar to Bungoma High Court Petition No. 5 of 2018 as the same involves the same parties, same cause of action, same properties and seek similar reliefs. He argued that on 20<sup>th</sup> March 2018, the Applicants instituted High Court Petition No. 5 of 2018 against the Respondents and that the same is pending determination by this Honourable Court.
3. He argued that the present suit is simply an attempt by the Applicants to defeat orders of the Honourable Court issued on 16<sup>th</sup> November 2022 in Bungoma High Court Petition No. 5 of 2018 whereby this Honourable Court struck out the Applicants witness statements and list of documents filed out of time and without leave of the Court. Further, that the present suit is similar to Bungoma



- High Court Petition No. 5 of 2018 as both involve same parties, same cause of action, same property, and seek similar orders of relief.
4. He deponed that by dint of the provisions of section 6 of the *Civil Procedure Act*, this Honourable Court lacks jurisdiction to entertain the present suit.
  5. He finally argued that the Petition is made with the sole intention to abuse the Court processes and it is incompetent, and bad in law.
  6. In response to the application, the Petitioners vide Hezekiah Francis Malika swore a replying affidavit dated 15/9/2023 wherein he averred inter alia; that the Petitioners have a right to withdraw their matter or claim filed in this court and that upon the withdrawal they filed the present petition; that the Petitioners have a right to withdraw their suit and then relitigate their claim at a more auspicious time if necessary as they have done herein; that section 6 of the *Civil Procedure Act* deal with stay of proceedings and not jurisdiction of the court; that technicalities are not meant to replace facts and that the present petition with sufficient grounds and ought to be sustained by this court.
  7. According to him, he is aware that the Court struck out in Petition No. 5 of 2018 witness statements and list of documents which made him take the decision to withdraw the Petition before it was heard as he established that his case will be weak. This allowed him to file a new case and thus the current Petition No. E16 of 2022.
  8. The application was canvassed by way of written submissions. It is only the Respondents who have complied.
  9. I have given due consideration to the application and the rival affidavits plus submissions filed. Basically, the Respondents have reiterated on what is contained in this Court's ruling dated 28<sup>th</sup> July 2023 whereby it held that Petition No. 16 of 2022 is sub-judice as the opportunity to present the Petitioner's case in Petition 5 of 2018 was lost when the Petitioners withdrew their Petition and thus they are now barred by the doctrine of sub-judice to bring a new suit seeking similar relief.
  10. The doctrine of sub judice, also known as the rule of sub judice, is a fundamental legal principle that prohibits this Court from proceeding with a trial or hearing a matter that is already being considered by another court or Judge. The purpose of this doctrine is to prevent multiple suits on the same issue and ensure consistency in the administration of justice.
  11. In *Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others* [2020] eKLR:  

In this case, the Supreme Court of Kenya had the opportunity to pronounce itself on the doctrine of sub judice. The Court defined sub judice as "before the Court or Judge for determination." It emphasized that the purpose of the sub judice rule is to prevent the filing of multiple suits between the same parties or those claiming under them, in order to avoid conflicting decisions and complications. The Court further noted that the doctrine aims to ensure that related issues are resolved by one Court only, in order to maintain consistency in the administration of justice
  12. In *Patel & Patel Ltd and another v Commissioner of Customs and Excise & 6 others* [2014] eKLR:  

The High Court discussed the application of the doctrine of sub judice. The Court held that the doctrine applies where an issue is pending in a Court of law for determination. It emphasized that when a matter is sub judice, it cannot be the subject of collateral attack in the same Court. The Court further noted that the principle of sub judice is grounded on the basis that, in the interest of parties and the system of administration of justice, multiple suits between the same parties should be avoided.



13. In *Ramniklal Gopalbhai Patel & 5 others v Somchandra Kachra Shah & 12 others* [2010] eKLR the High Court considered the doctrine of sub judice in relation to an appeal. The Court held that where a matter is the subject of an appeal, it cannot be made the subject of collateral attack in the same Court. The Court further emphasized that the doctrine of sub judice applies to deprive the Court of jurisdiction to entertain the matter. It highlighted that the principle of sub judice is based on the interest of parties and the system of administration of justice, to prevent a multiplicity of suits and ensure proper resolution of disputes.
14. The above case laws illustrate the application and significance of the doctrine of sub judice in Kenyan law. They emphasize the importance of avoiding multiple suits on the same issue and maintaining consistency in the administration of justice. The doctrine serves to protect the integrity of the judicial process and ensure fair and efficient resolution of disputes. Legal professionals should take into account the doctrine of sub judice when considering the filing of a new suit or raising similar issues in ongoing proceedings.
15. Back to this instant application, it is clear that this Court vide its ruling delivered on 28<sup>th</sup> July 2023 declined the invitation by the Petitioners to consolidate the two Petitions, High Court Petition No. 5 of 2018 and No. 16 of 2020. Further in my ruling, I established that Petition No. 5 of 2018, which was partially heard and was to proceed to come for further hearing of the Respondents cross Petition was the one to be entertained. The Petitioners, aware of this circumstances, proceeded to withdraw their claim in the Petition No. 5 of 2018 and file a fresh Petition seeking similar reliefs under Petition No. 16 of 2020. This move which I still consider to be akin to countermanding the order I made on 16<sup>th</sup> November 2022 and an effort to resuscitate their Petition, which was withdrawn, through the back door. Further, the opportunity to present the Petitioners/Applicants case in Petition No. 5 of 2018 was lost when the Petitioners withdrew their Petition. It was clearly established that the doctrine of sub-judice sufficed when the Petitioners/Applicants tried to bring a new suit seeking similar reliefs as in proper circumstances, the first suit, Petition No. 5 of 2018, ought to have been decided so that the issued decision can be binding and thus prevent duplication of issues.
16. It is elaborate that this Court in its Ruling dated 28<sup>th</sup> July 2023, established that indeed the doctrine of sub-judice had been established and it is my finding that the Respondents application dated 9<sup>th</sup> August 2023 seeks to simply regurgitate already established facts that, the Petition No. 16 of 2022 was sub-judice.
17. The order of this court, which is still not vacated is that the parties should focus on ensuring the prosecution of the Respondents cross Petition. The decision of this court dated 28/7/2023 is still in force namely that this Petition number 16 of 2022 is sub judice as the pending Petition number 5 of 2018 is yet to be concluded and hence the present application dated 9<sup>th</sup> August 2023, is overtaken by events. It was not necessary for the Respondents to file the same.
18. In the result, it is my finding that the application dated 9/8/2023 lacks merit. The same is dismissed with costs to the petitioners.

**DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2023.**

**D. KEMEI**

**JUDGE**

In the presence of:

Otinga for Petitioners

Wekesa for Maloba for Respondents



