



**PMN v EKN (Environment & Land Miscellaneous Case
E020 of 2022) [2023] KEELC 17784 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND MISCELLANEOUS CASE E020 OF 2022**

CK YANO, J

MAY 31, 2023

BETWEEN

PMN APPLICANT

AND

EKN RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated October 31, 2022 in which the Applicant seeks orders that pending hearing and determination of Divorce Cause No. E017/2021 in the Chief Magistrate’s Court at Chuka and Matrimonial Cause No. E001 of 2021 in the High Court at Chuka, the Respondent be restrained from in any manner interfering with the substratum, the suit property LR NO. Karingani/gitarene/3083, LR NO. Karingane/Gitarene/4097 and LR No. Karingani/Gitarrene/1152 and from doing any form and/or manner of development thereof. The application is brought under section 1A, 1B, 3A and 63 (c) (e) of the *Civil Procedure Act*, Order 40 of the *Civil Procedure Rules* and article 40 of the *Constitution*.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Peter Mugendi Njoka, the Applicant sworn on October 31, 2022. The Applicant avers that the suit properties are his which he bought on his own and without the Respondent’s help or contribution whatsoever. That the said properties are subject of the above cases which are still ongoing and despite the pendency of those cases, the Respondent has been and continues to put up structures and developments which are interfering with the applicant’s rights and interests in the suit property. It is the applicant’s contention that the respondent’s actions are tailored for ulterior purposes of defeating the course of justice, and that if the orders sought herein are not granted, the applicant stands to suffer great prejudice, irreparable loss and damage. That the respondent will suffer no prejudice if the orders are granted and that it is in the interest of justice and fairness that the orders and reliefs sought herein are granted by this honourable court. The applicant has annexed copies of certificates of official search, copy of pleadings in Chuka CMC Divorce Cause NO. E017 of 2021 and photographs.



3. The respondent opposed the application through a preliminary objection and a replying affidavit sworn on February 14, 2023 in which she avers inter alia, that the Applicant is her husband with whom they have been married since 2007 under Ameru Customary Law to date. The respondent states that she filed for divorce being a Chuka CMC Divorce Cause No. E17 of 2017 in which the applicant admits that they are husband and wife having solemnized their marriage around 2007 through Ameru Customary Law. The Respondent has also annexed copies of the petition and answer to petition in the said Divorce Cause.
4. It is the respondent's contention that the suit properties are matrimonial properties acquired jointly by the applicant and the respondent, and that they established their matrimonial home on LR. No. Karingani/Gitarene/3083 where the Respondent now lives alone after the Applicant deserted the home and started living with another lady. The respondent denies the averments in the affidavit in support of the application and states that the photographs attached are for repairs that were being undertaken. The respondent states that the applicant has recently married another woman and with the help of his advocate has tried to evict the respondent from the matrimonial home, a matter she states was reported to Cheera Police Post. A copy of the OB Number has been annexed.
5. The respondent accuses the applicant of trying to sell the matrimonial property and that the respondent moved to the High Court at Chuka vide matrimonial cause No. 1 of 2021 seeking orders of injunction which orders were issued by that court. The pleadings in that cause have been annexed. It is the respondent's contention that it is in the best of fair administration of justice that the matter be left for determination before the High Court as it would cause unnecessary confusion if this court were to issue conflicting orders with those issued by the High Court on the same subject matter. The respondent prays that the application herein be struck out.
6. The application was canvassed by way of written submissions which were filed by both parties through their respective advocates on record and which I have read and considered. Having considered the application, the response and the rival submissions made, the issue for consideration is whether the court should entertain the application, and if so whether the orders sought should be granted.
7. The proceedings herein have been commenced by the applicant by way of a miscellaneous application seeking injunctive orders. The matter is brought by way of a Notice of motion. The court has noted that the notice of motion application is not grounded on any suit.
8. Section 2 of the [Civil Procedure Act](#) defines 'suit' to mean all civil proceedings commenced in any manner prescribed. Section 19 of the [Civil Procedure Act](#) provides as follows:

“19. Every suit shall be instituted in such manner as may be prescribed by rules.”
9. Order 3 rule 1(1) of the [Civil Procedure Rules](#) provides that:

“1(1) Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”
10. It is clear from the above provisions of law that a suit may be instituted by way of a plaint. It may also be instituted by way of a petition or an originating summons. Unfortunately, in the present case, the notice of motion is not accompanied by any plaint, petition or an originating summons. The applicant has simply moved the court by way of a miscellaneous application yet he is seeking substantive orders. In my view, the notice of motion has been made in a vacuum and is not a suit property so called. The failure by the Applicant to follow the laid down procedure prescribed by the rules goes to the root of litigation which cannot be salvaged by article 159 of the [Constitution](#) or sections 1A, 1B and 3A of the



Civil Procedure Act as pleaded by the Applicant. On that ground alone, I am of the opinion that the application is unsustainable.

11. Further, in this case, both parties are in agreement that there are other suits pending before other courts between the parties herein and over the same subject matters. These are Chuka Chief Magistrate's Court Divorce Cause No. E17 of 2021 and Chuka High Court Matrimonial Cause No. E001 of 2022. The Application herein seeks injunctive orders in respect of the suit properties pending hearing and determination of those other suits.

12. Section 6 of the Civil Procedure Act provides as follows:

“6. 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.”

13. In the case of Republic v Registrar of societies – Kenya & 2 others [2017]eKLR it was held as follows:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: first, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

14. Going by the above provisions of law and cited case, it clear that what the doctrine of sub-judice entails are same parties involved in the same/similar subject matter in various suits in different courts. It is apparent that the parties in this matter are also the same parties in ChukaCMCDivorce Cause No.E17 of 2021 and Chuka High Court Matrimonial Cause No. E001 of 2022 and the subject matters are also the same. Therefore, in my view, this matter is sub-judice that other pending suits and cannot be sustained. Moreover, if this court were to entertain the application herein, it may result in the issuance of conflicting orders to those made by those other courts, including the High Court which is of the same status as this court, which action may be embarrassing to the court.

15. Accordingly, it is my finding that the notice of motion dated October 31, 2021is incompetent and the same is hereby struck out with costs to therespondent.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31st day of May, 2023.

In the presence of:

CA: Martha

Kirimi for Applicant

Muthoni Gitari for Respondent

C. K. YANO,

JUDGE.



