



**Mwamisi the Chairman Maliku Location Development Committee v Manager
C.D.F. Kitui Rural Constituency & 4 others (Constitutional Petition
E003 of 2020) [2022] KEHC 14335 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CONSTITUTIONAL PETITION E003 OF 2020**

RK LIMO, J

OCTOBER 24, 2022

BETWEEN

**ABLE ABEL SAFARI MWAMISI THE CHAIRMAN MALIKU LOCATION
DEVELOPMENT COMMITTEE PETITIONER**

AND

MANAGER C.D.F. KITUI RURAL CONSTITUENCY 1ST RESPONDENT

JIMMY KIOKO NGAU 2ND RESPONDENT

DORCAS NZOMO 3RD RESPONDENT

MUANGE MULI 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. Abel Safari Mwamisi, the petitioner herein has lodged this petition against the manager Constituency Development Fund (C.D.F.), Kitui Rural Constituency and 4 Others alleging infringements of his Constitutional rights and that of other residents of Ikave Shopping Centre. His grievances against the respondents are that while the majority of the Residents preferred the Chief's Office to be constructed at Ikave, the Respondents and the Deputy Commissioner unilaterally and against the wishes of majority decided to relocate the office to Maliku Shopping Centre.
2. He alleges that the Respondents action violated *the Constitution* and various provisions of Statutes. He cites the provisions of Articles 10, 73, 201 and 232 as having been infringed as well as Sections 32 and 41(1) of the National Government Constituencies Development Fund Act and has asked this court to intervene and grant the following prayers/reliefs.



- a. “A declaration that the 1st Respondent is in contravention of Article 10 of *the Constitution* by not following the proper procedure in approving the proposal presented by the 2nd, 3rd and 4th Respondents while 2nd and 3rd and 4th Respondents did not follow the proper procedure in presenting the proposal approved by the 1st Respondent (sic) and without the authority and participation of the people of Maliku and thereby subverting the will of the people of Maliku that the Chief’s office be at Ikave Market.
 - b. An Order of prohibition to prohibit and/or restrain the 2nd, 3rd and 4th Respondents from either by themselves, their agents and/or employees or whomsoever else is acting on their behalf from relocating the Chief’s Office from Ikave Market to Maliku Market.
 - c. An Order of *Mandamus* directing the 2nd, 3rd and 4th Respondents to account for the cheque obtained from the 1st Respondent.
 - d. An Order of *certiorari* calling and forthwith quashing the 1st Respondent’s approval of a community project that was presented by people who were not elected committee of community.
 - e. An Order of costs to the Petitioner and any other Order, writs considered appropriate and just to grant for the purpose of enforcement of petitioner’s fundamental rights and freedoms.”
3. The Respondents in answer to this Petition raised a preliminary objection on grounds that there is a parallel suit filed by the Petitioner *vide* Kitui High Court Civil Case No. 5 of 2019 involving the same parties and that suit was later transferred to Chief Magistrate’s Court where it is pending. They have faulted the filing of this Petition as an abuse of court process.
 4. The Preliminary Objection has been canvassed by way of written submissions pursuant to the directions of this court.
 5. The 1st to 4th Respondent in their submissions dated February 9, 2020 submit that the suit herein is sub judice and should be struck out.
They contend that the suit herein is similar to another suit filed through Kitui Chief Magistrate Court Civil Case No. 5 of 2019 which they claim are between same parties and that the subject matter is similar in the 2 suits. They have cited the decision in *Republic versus Paul Kihara Kariuki & 2 Others Ex parte LSK* [2020]eKLR.
 6. The 5th Respondent in its submissions through State Counsel dated May 19, 2022 argues that the subject matter of the present petition is the same as the one contained in another suit filed by the Petitioner being Kitui Chief Magistrate’s Court Civil Suit No. 196 of 2020 and that the issue pertains to relocation of Maliku Chiefs Office from Maliku Primary School compound’s to Maliku Shopping Centre which the Petitioner alleges to be contrary to the public’s choice of Ikave Shopping Centre.
 7. The 5th Respondent has further cited the Supreme Court in its advisory opinion in the case of *Kenya National Commission on Human Rights versus Attorney General, Independent Electoral & Boundaries Commission and 16 Others (Interested Parties)* [2020] eKLR where the Supreme Court struck out reference filed before it because of a pendency of another matter that was substantially similar in the High Court.
 8. This court has considered the Preliminary Objection raised and the only issue for determination is whether the Petitioner herein raises matters that are “subjudice” or pending in another court and if so what is the remedy.



9. The cause of action in this petition relates to construction or relocation of a Chief's Office from Maliko Primary School compound to Maliku Shopping Centre.

The Petitioners argue that the majority of the residents of Maliku Location preferred Ikave Shopping Centre and have accused the respondents for acting unilaterally and without public participation by opting for Maliku Shopping Centre instead of Ikave Shopping Centre as preferred or proposed by the Petitioner.

10. The Respondents on their part argue that the Petitioner is abusing the court process by filing the present petition as he has another suit raising the same issues being Kitui CMCC No. 196 of 2020 Abel Safari Mwamisi vs the Manager, C.D.F Kitui Rural Constituency & 4 Others. They submit that the case is currently pending in the Chief Magistrate's Court Kitui.
11. The Respondents have not attached pleadings of the said suit in the lower court, however, the 3rd Respondent has annexed pleadings of Civil Case No. 5 of 2019 in his unsworn Affidavit filed on January 11, 2020. In that Affidavit, the deponent avers that the aforementioned suit which has initially been filed before this court as Civil Case No. 5. of 2019 was later transferred to the lower court by this court on October 19, 2020 and renamed Kitui CMCC 196 of 2020
12. A comparison of the two petitions shows that the Petitioner in the two suits is challenging the relocation of the chief's office from Maliku to Ikave and he is seeking to have the 2nd,3rd and 4th Respondents restrained from moving forward with the relocation. In this matter he is seeking for an order of mandamus directing the 2nd,3rd and 4th Respondents to account for the money obtained from the 1st Respondent in relation to the project.
13. In Kitui Chief Magistrate's Court Civil Case No. 196 of 2020, the Petitioner who is the Plaintiff therein is seeking similar orders. He is seeking a permanent injunction restraining the defendants from relocating chief's office from Ikave Shopping Centre to Maliku Shopping Centre, he is also seeking an order directing the Defendants to give a proper account of the cheque of Kshs 600,000 obtained for purposes of building the chief's office.
14. Determination of the suit in the subordinate court will determine the issues raised in the present Petition. The subordinate court will determine the question of relocation of the chief's office as well as the accountability of the funds issued in relation to the project i.e the Kshs 600,000/- cheque.
15. The Petitioner has not disputed the pendency of another is pending being Kitui Chief Magistrate Civil Case No. 196 of 2020 where the matters in issue are similar to the issues raised in this Petition.
16. The doctrine of *sub judice* is set out in Section 6 of the [Civil Procedure Act](#) which stipulates;

“...No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”
17. The Supreme Court in its advisory opinion in the case of [Kenya National Commission on Human Rights vs Attorney General, Independent Electoral & Boundaries Commission & 16th Others \(Interested Parties\)](#) (2020) eKLR referred to the [Black's Law Dictionary](#) 9th Edition definition of Sub Judice as;



“Before the Court or Judge for determination.” . The Supreme Court then proceeded in its advisory opinion as follows;

“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.”

18. Justice Mativo discussed the concept sub judice in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR where he stated as follows:-

“...there exists the concept of sub judice which in Latin means “under Judgment.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.” Mativo J. (as he then was) proceeded to strike out the suit holding that the existence of another suit would render issues in subsequent suit res-judicata.

19. This Court in view of the above finds merit in the Preliminary Objection raised. The Petitioner is involved in an abuse of Court process for filing 2 parallel suits aimed at achieving the same purpose. That is improper and irregular it cannot be allowed. Under the provisions of Section 6 of the *Civil Procedure Act*, this petition cannot be entertained because doing so would be an abuse of court process and tantamount to allowing 2 parallel processes in court to proceed over the same parties and over the same issues or grievances.

20. The preamble under Section 6 of *Civil Procedure Act* reads that the court in a subsequent suit can Order stay of proceedings but in such a scenario, supposing a stay of proceedings were to be ordered? What would be the effect of decision in the Lower Court? The Lower Court’s decision or determination over the issues at hand certainly will render the same res judicata if the issues were to be re-litigated over again through this petition. Once the Lower Court determines the suit before it any aggrieved party can only invoke the appellate jurisdiction of this court because of the doctrine of res judicata.

This court finds the **Preliminary Objection** raised by the respondents is merited. The same is sustained. This petition is struck out but each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT KITUI THIS 24TH DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

