



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**Coram: D. K. Kemei - J**

**CIVIL CASE NO. 17 OF 2020**

WENDANO MATUU CO LTD.....1<sup>ST</sup> APPLICANT  
JOSHUA KIMEU KIOKO.....2<sup>ND</sup> APPLICANT  
JAMES KIOKO KIVUVO.....3<sup>RD</sup> APPLICANT  
JUVENALIS MUSYOKI KAVITA.....4<sup>TH</sup> APPLICANT  
ROSE NDANU MUTUA.....5<sup>TH</sup> APPLICANT

**VERSUS**

STEPHEN NDAMBUKU MULI.....1<sup>ST</sup> RESPONDENT  
ONESMUS MUISYO.....2<sup>ND</sup> RESPONDENT  
ELIZABETH MUTUKU.....3<sup>RD</sup> RESPONDENT  
PASCALINE KITONGA.....4<sup>TH</sup> RESPONDENT  
ESTHER KWINGA.....5<sup>TH</sup> RESPONDENT  
BENARD WAMBUA.....6<sup>TH</sup> RESPONDENT  
RICHARD MBALU.....7<sup>TH</sup> RESPONDENT  
CHRISTOPHER NZIMBA.....8<sup>TH</sup> RESPONDENT  
BENEDICT MUTUKU.....9<sup>TH</sup> RESPONDENT  
PETER KASEVA.....10<sup>TH</sup> RESPONDENT  
HARRISON NZIOKA.....11<sup>TH</sup> RESPONDENT  
BONFACE MAWEU.....12<sup>TH</sup> RESPONDENT  
CHRISTINE NGAO.....13<sup>TH</sup> RESPONDENT

**-AND-**

**THE REGISTRAR OF COMPANIES**  
**(BUSINESS REGISTRATION SERVICES).....INTERESTED PARTY**

## RULING

1. The Ruling relates to the preliminary objection raised by the respondent that is to the effect that the application dated 7.9.2020 is subjudice. It was pointed out vide an affidavit deponed by Stephen Ndambuki Muli on 28.10.2020 that there was an application dated 2.6.2020 (Annexure S1) that was filed by the 2<sup>nd</sup> to 5<sup>th</sup> applicants in Machakos High Court civil case 2 of 2014 that sought similar orders as in the instant proceedings. According to the deponent, the issue of directorship was central in the application filed in **Civil Case 2 of 2014**.

2. Vide submissions filed on behalf of the respondents by Howard, Nick and Kenneth Advocates, and touching on the issue if sub judice, reliance was placed on section 6 of the Civil Procedure Act. It was the strong argument of counsel that the instant application offended section 6 of the Civil Procedure Act as it touched on the directorship of the 1<sup>st</sup> applicant company which question is directly and substantially in issue in **Machakos HCCC 2 of 2014**. It was further pointed out that the former and current suit revolved around the same parties who are litigating under the same title and that this court is vested with the jurisdiction to determine the **Machakos HCCC 2 of 2014**. The court was urged to dismiss the instant application.

3. There is no indication of any reply to the point of law that was raised by the respondents.

4. Even though parties herein had taken directions to dispose of the plaintiffs' application dated 7.9.2020 by way of written submissions, I find that the point of law raised by the respondents is a germane issue which ifso facto must be determined before delving into the other issues. Hence, it is necessary for this court to tackle the point of law that has been raised by the respondent's counsel. Having arrived at the above decision I now proceed to make a finding that the following issues are necessary for determination:

*a. Whether the suit is barred by the doctrine of sub judice.*

*b. What order may the court make?*

5. With regard to the issue of subjudice, the provisions of section 6 of the Civil Procedure Act are clear. The learned Authors of Sarkar Code of Civil Procedure, 11<sup>th</sup> Edition by Sudipto Sarkar and VR Manohar at page 93 stated that the elements to be fulfilled are that firstly the matter in issue in the second suit is also directly and substantially in issue in the first suit; Secondly that the parties in the second suit are the same or parties under them whom they are or any of them claim are litigating under the same title; Thirdly that the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit and finally that the previously instituted suit is pending adjudication before competent court.

6. The first part of section 6 states that **"No Court shall proceed with the trial of any suit or proceeding:** - This means that the court where subsequent litigation has been instituted if the matter is sub judice is not permitted to continue with trial of the proceeding and as such the subsequent litigation needs to be stayed notwithstanding the stage at which it is. In this case, the doctrine bars the application in Civil Suit 17 of 2020 from proceeding when the application in Civil Suit 2 of 2014 is yet to be determined.

7. **Matter directly and substantially in issue test:** - It means the rights litigated between the parties i.e. the facts on which the right is claimed and the law applicable to the determination of that issue. The words "matter in issue" used in section 6 do not mean that entire subject-matter of the subsequent suit and the previous suit must be the same. These words mean all disputed material questions in the subsequent suit which are directly and substantially in question in the previous suit.

8. **'Fact in issue'** with respect to section 3 of the Evidence Act, Cap 80 is defined as any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows; It can therefore be said that the matter in issue is of two types: -

*a) Matter directly (immediately) and substantially (materially) in issue.*

*b) Matter collaterally and incidentally in issue.*

9. In the instant case, the matter in issue in the application dated 2.6.2020 in **Machakos HCCC 2 of 2014** as gleaned from annexure S1 are that Stephen Ndambuki Muli and Onesmus Muisyo Kimatu are to be restrained from interfering with the operations and management of the operations of Wendano Matuu Co. Ltd as they are not directors of the said company in view of the fact that elections were conducted on 28.11.2013. In the application filed in Nairobi that is now the instant application, the issue is that the defendants who include Onesmus Muisyo and Stephen Ndambuki were to be restrained from purporting to act as directors of the suit company and running affairs of the same as the applicants were duly elected as the board of directors of the suit company on 28.11.2013. I am convinced that the matters in issue in the instant suit are the same as those in the previous suit.

10. **Same Parties test:** - The previously instituted suit **HCCC 2 of 2014** is a suit between the same parties as in the instant suit. The parties whose name appears on the record at the time of the filing of HCCC 2 of 2014 are the same as those in the instant matter though the instant matter has additional parties.

11. **Same title test:** - It means same capacity or interest of a party that is to say whether he sues or is sued for himself in his own interest or for himself as representing the interest of another. In the instant suit, the applicants sue as what are stated to be the elected directors of the suit company and the respondents are sued as the ones purporting to act as directors. In the former suit, this is the same case.

12. **Previously instituted suit must be pending test:** - The previously instituted suit between the parties is pending before this court for determination.

13. It is important to note that the sub judice rule applies to trial of a suit and not the institution thereof. In the Indian case of **Indian Bank v Maharashtra State Coop. Marketing Federation, AIR 1998 SC 1952** it was stated that ‘

*“Section 10 of the Code prohibits the court from proceeding with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit provided other conditions mentioned in the section are also satisfied. The word 'trial' is no doubt of a very wide import as pointed out by the High Court. In legal parlance it means a judicial examination and determination of the issue in civil or criminal court by a competent Tribunal. According to Webster Comprehensive Dictionary, International Edition, it means the examination, before a tribunal having assigned jurisdiction, of the facts or law involved in an issue in order to determine that issue. According to Stroud's Judicial Dictionary (5th Edition), a 'trial' is the conclusion, by a competent tribunal, of question in issue in legal proceedings, whether civil or criminal. Thus in its widest sense it would include all the proceedings right from the stage of institution of a plaint in a civil case to the stage of final determination by a judgment and decree of the Court. Whether the widest meaning should be given to the word 'trial' or that it should be construed narrowly must necessarily depend upon the nature and object of the provision and the context in which it used.*

*Therefore, the word "trial" in section 10 will have to be interpreted and construed keeping in mind the object and nature of that provision and the prohibition to 'proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit'. The object of the prohibition contained in section 10 is to prevent the courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit. It has been construed by the courts as not a bar to the passing of interlocutory orders such as an order for consolidation of the later suit with earlier suit, or appointment of a Receiver or an injunction or attachment before judgment. The course of action which the court has to follow according to section 10 is not to proceed with the 'trial' of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. In view of the object and nature of the provision and the fairly settled legal position with respect to passing of interlocutory orders it has to be stated that the word 'trial' in Section 10 is not used in its widest sense.*

*The provision contained in section 10 is a general provision applicable to all categories of cases. ....”*

14. For the reasons given above the Plaintiff's present application and suit must be stayed pending determination of the pending **suit number 2 of 2014 at Machakos High Court**. I proceed to make the following orders:

***a) The application dated 7.10.2020 being barred by the doctrine of subjudice is hereby stayed pending determination of Machakos HCCC No. 2 of 2014.***

***b) As no reason has been given for the dismissal of the instant suit; the only action that this court is required to make by dint of section 6 of the Civil Procedure Act is to stay the instant proceedings and this court hereby proceeds to stay proceedings herein until suit in Machakos HCCC No. 2 of 2014 is heard and determined.***

***c) Costs shall be in the cause.***

It is so ordered.

**Dated and delivered at Machakos this 25<sup>th</sup> day of January, 2021.**

**D. K. Kemei**

**Judge**