



**Mutegi (Legal representation of Estate of Eustace Mutegi Murungi) v
Njoka & another (Environment and Land Miscellaneous Application
E019 of 2022) [2023] KEELC 19033 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E019 OF 2022
CK YANO, J
JULY 26, 2023**

BETWEEN

**JOSEPHINE MUIRU MUTEGI APPLICANT
LEGAL REPRESENTATION OF ESTATE OF EUSTACE MUTEGI MURUNGI**

AND

**AGRIVINE KABURI NJOKA 1ST RESPONDENT
IDAH MUTHONI MBAARA 2ND RESPONDENT**

RULING

1. By a notice of motion dated October 11, 2022 the applicant seeks the following orders:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the matter in Chuka High Court Misc succession application No 52 of 2018, this honourable court be hereby pleased to issue an injunctive order restraining the respondents either by themselves, their agents, their representatives, their servants and/or anybody acting at their behest from in any manner entering into, dealing with, evicting from and/or interfering with the applicant's exclusive and free possession and/or utilization of land parcel LR No Karingani/Muiru/145 and that the status quo thereof be maintained.
 4. That an order do issue directing that the registration of the title for the parcel of land LR No Karingani/Muiru/145 transferred by the 1st respondent to the 2nd respondent be cancelled.



5. That this honourable court be pleased to issue any further orders it deems fit and just in the circumstances.
 6. That the costs of this application be provided for.
2. The application is premised on the grounds thereon and supported by the affidavit of Josephine Muiru Mutegi sworn on October 11, 2022 in which she has deponed *inter alia*, that LR Nos Karingani/Muiru/145 and Karingani/Muiru/461 are subject of ongoing proceedings in Chuka High Court Misc succession application No 52 of 2018 in which there is an application dated September 16, 2022 seeking enlargement/extension of time to file record of appeal awaiting ruling slated for November 10, 2022. That the 1st respondent has hurriedly either sold or transferred LR No Karingani/Muiru/145 to the 2nd respondent which is the applicant's only home. The applicant has annexed copies of limited grant of letters of administration ad litem, official search, green card, and order and notice of appeal.
 3. In opposing the application, the respondents filed a replying affidavit sworn by Agrivine Kaburi Njoka, the 1st respondent on October 19, 2022 and a notice of preliminary objection of even date seeking to have the application dismissed on the grounds that the same is res sub-judice and offends the provisions of section 6 of the [Civil Procedure Act](#) as a similar application is pending before Chuka HC Misc succession cause No 52 of 2018, that the application is fatally defective and cannot be cured as the miscellaneous application is unsupported by a substantive plaint and thereby offending the provisions of section 2 of the [Civil Procedure Act](#), and that the application is frivolous, bad in law, vexatious and an abuse of the process of the court.
 4. Pursuant to directions given by the court on November 7, 2022 the application was canvassed by way of written submissions. The applicant filed her submissions on December 22, 2022 through the firm of Waklaw Advocates while the respondents filed theirs on February 1, 2023 through the firm of Kiautha Arithi & Co Advocates.
 5. The applicant submitted that the application became necessary after the court seized of the Chuka HC Misc succession cause No 52 of 2018 indicated its reluctance/incapacity to grant orders sought in the application herein and pointing out that this court is the right and proper one to grant the orders sought herein. That considering the nature, gravity and urgency of the grounds and issues raised in the application, it was expedient, necessary, proper and therefore appropriately crucial for the applicant to bring the instant application to safeguard her legitimate interests, which included an imminent danger of being evicted and losing her only home and properties. It is the applicant's submission that she has come to this court as a matter of extreme necessity as any delay would have irredeemable ramifications on the applicant. The applicant cited the maxim that states delay defeats equity and which is bolstered by the fact that equity looks to the intent rather than the form. The applicant submitted that there is nothing in the application that makes it res sub-judice as argued by the respondents.
 6. On whether the application offends the provisions of section 2 of the [Civil Procedure Act](#), the applicant submitted that the orders sought are for purposes of preserving the status quo of the suit property in Chuka HC Misc succession cause No 52 of 2018 and not for the enforcement of any substantive rights. That the orders sought can be availed without going through the process of filing suit. The applicant relied on the case of *Joseph Kibowen Chemor v William C. Kaseru* [2013] eKLR. The applicant further denies that the instant application is frivolous, bad in law, vexatious and an abuse of the court process. It is the applicant's submission that the application satisfies the provisions of order 40 of the [Civil Procedure Rules](#) especially on the need to preserve and/or protect the suit property.



7. The applicant submits that the preliminary objection herein fails the test as set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 and urged the court to dismiss it in its entirety and allow the application.
8. In their submissions, the respondents cited the provision of section 6 of the *Civil Procedure Act* pertaining to the doctrine of sub judice and relied on the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (interested parties)* [2020] eKLR and *Republic v Paul Kibara, Attorney General & 2 others ex-parte Law Society of Kenya* [2020] eKLR. The respondents submit that the current suit brought as a miscellaneous application and there is another filed as succession cause No 52 of 2018 in the High Court at Chuka where in both cases the applicant is seeking *inter alia*, injunction orders against the 1st respondent. That it is clear that these are two different suits between the same parties dealing with the same subject matter and pending before courts of competent jurisdiction. The respondents relied on the case of *ANN v RMK* [2021] eKLR and urged the court to find that this matter is sub judice and dismiss the application with costs.
9. I have considered the application, the preliminary objection raised and the rival submissions made. The issues for consideration are whether the preliminary objection raised is merited or whether the orders sought in the application dated October 11, 2022 should be granted.
10. The main grounds of the objection are that the applicant’s application is sub judice and offends the provisions of section 2 of the *Civil Procedure Act*. A preliminary objection should be raised on a pure point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.
11. In the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (supra), Sir Charles Newbold, President stated as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”
12. At this stage, the court will only consider legal issues that go to the root of whether there is a competent suit before court and/or whether the court has/lacks jurisdiction to hear and determine such matter.
13. In this case, both parties are in agreement that there is another matter pending before the High Court involving the same parties and over the same subject matter in Chuka HC Misc application succession cause No 52 of 2018. Therefore, the objection is properly taken. The applicant herein has submitted *inter alia* that it moved this court when the High Court in the succession cause indicated its reluctance to grant the orders sought in the application herein. 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.”



14. In the case of *Republic v Registrar of Societies – Kenya & 2 others* [2017] eKLR, it was held that:
- “...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 previous 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...”
15. Going by the above provisions of law and cited cases, it is 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. In the application herein, the applicant has admitted that there is another matter in Chuka HC Misc succession cause No 52 of 2018. The applicant and the respondents have annexed the pleadings and orders in the said cause. As already stated, the applicant has submitted that she has only moved this court because the judge in the said succession cause was reluctant to grant the orders sought. In my view, that was not a good reason to file another matter before this court. If the applicant was dissatisfied and/or aggrieved by the decision of that other court, she could have appealed the court’s decision and not file another matter before this court which has concurrent jurisdiction as the High Court. I find that the objection in that regard is sustainable as the application herein is indeed sub-judice.
16. The other issue to be addressed is whether the suit offends the clear provisions of the *Civil Procedure Act*. In section 2 of the said Act, “suit” is defined to mean all civil proceedings commenced in any manner prescribed. Section 19 provides that “every suit shall be instituted in such manner as may be prescribed by the rules.” order 3 rule 1(1) of the *Civil Procedure Rules* provides that “every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”
17. The applicant’s application which is a claim for injunction and cancellation of title of the suit land has been made by way of a miscellaneous application. The rules prescribe that a suit may be instituted by way of a plaint, petition or an originating summons. However, in the present case, the applicant has come by way of a notice of motion miscellaneous application seeking substantive orders and there is no substantive suit that the application is predicated, grounded and/or premised. In my view, the miscellaneous application by way of notice of motion has been made in a vacuum and is not a suit properly so called. I therefore agree with the respondent’s objection in that regard. The failure to follow the laid down procedure goes to the root of litigation and therefore cannot be salvaged by article 159 of the *constitution* nor section 1A, 1B and 3A of the *Civil Procedure Act* as pleaded and submitted by the applicant.
18. In the case of *Raila Odinga v IEBC & others* [2013] eKLR, it was observed that:
- “Article 159(2)(d) of the *Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.”
19. The case of *Board of Governors Nairobi School v Jackson Ireri Geta* (1999) KLR cited with approval in *Fidelity Bank Ltd v John Joel Kanyali* miscellaneous application 8/2014 clarified how suit can be commenced when it said:
- “Pleadings is defined in section 2 of the *Civil Procedure Act* to include a petition or summons and the statements in writing of the claim or demand of any Plaintiff, and the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counter claim of a



defendant; this definition is couched in such a way as to accord with order 1v rule 1 (now order 3 rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed...”

20. I am accordingly in agreement with the preliminary objection raised by the respondents that the proceedings herein are incompetent, bad in law and fundamentally defective. The same is devoid of merit and must fail.
21. Accordingly, the notice of motion dated October 11, 2022 is hereby struck out with costs to the respondents.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JULY, 2023.

In the presence of :

CA: Martha

Ms. Musyimi h/b for Kirimi for Defendant/Applicant

Nyaga for Plaintiff/Respondent

C. K. YANO,

JUDGE.

