



**Achieng v Atinga & 4 others (Environment and Land Appeal
1 of 2023) [2023] KEELC 18976 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 1 OF 2023
GMA ONGONDO, J
JULY 25, 2023**

BETWEEN

HILDA LINET ACHIENG APPELLANT

AND

JANET AKINYI ATINGA 1ST RESPONDENT

JEROME MODECHAI ATINGA 2ND RESPONDENT

JAPHETH ANGILA ATINGA 3RD RESPONDENT

THE LAND REGISTRAR, MIGORI 4TH RESPONDENT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. This ruling is in respect of the appellant/applicant's Notice of Motion application dated March 22, 2022 and filed herein on even date (the application) and the 1st and 2nd respondents' Notice of Preliminary Objection (the preliminary objection) dated April 20, 2022 and filed in court on April 21, 2022.
2. The appellant is represented by Omonde Kiseru and Company Advocates. The 1st and 2nd respondents are represented by Akello Karuga & Company Advocates while the 3rd respondent is represented by Odhiambo Oronga and Company Advocates.
3. The 4th and 5th respondents have not entered appearance herein.
4. The appellant filed the application under Article 40, 48, 50 and 159 (2) of the *Constitution* of Kenya 2010, Section 2 of the *Law of Succession Act*, Chapter 160 Laws of Kenya, Sections 1, 1A, 3, 3A, 63 (e) and 66 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya 2010, Order 42 Rules 6(1), (2) and (5)



of the *Civil Procedure Rules, 2010*, and Rule 3(1) and (2) of the *High Court (Practice and Procedure) Rules* seeking the orders infra:

- a. Spent
 - b. Spent
 - c. There be an interim stay of execution of the order of the subordinate court dated March 3, 2022 pending hearing and determination of the applicant's appeal herein.
 - d. Costs of this application be provided for.
5. The 1st and 2nd respondents opposed the application by way of a replying affidavit sworn on April 20, 2022 by one Prof John E Oluoch Ating'a, a holder of power of attorney registered at the Land Titles Registry in Nairobi as no. P/A 66017/1. The respondents deposed, *inter alia*, that the suit property, Kamagambo/Kabuoro/2971, belongs to the estate of Dr Polycarp Erick Wambi (deceased), who died testate and whose estate is administered by the 1st respondent as executrix thereof. That the appellant fraudulently transferred the suit property to herself. That the same is the subject of Migori High Court Succession Cause No 27 of 2018.
 6. Together with the Replying Affidavit, the 1st and 2nd respondents filed the Notice of Preliminary Objection hereinabove mentioned. The gist of the preliminary objection is that the instant application is sub-judice and amounts to gross abuse of the court process by the appellant/applicant herein.
 7. On March 22, 2022, the court ordered and directed that the Application be heard by way of written submissions in the spirit of Article 159 (2) (b) of the *Constitution* of Kenya, 2010; see also *Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 others* (2013) eKLR. The preliminary objection was also heard by way of written submissions.
 8. Accordingly, the appellant, through counsel, filed submissions dated November 23, 2022 on even date, in support of the application and against the Preliminary Objection. Counsel submitted that the appeal filed herein is arguable and raises triable issues as the impugned order is against the law since it is only in a succession cause where the rights of contending beneficiaries to inherit an estate can be determined.
 9. Further, counsel submitted that the High Court at Migori in Succession Cause No 27 of 2018 has since granted orders of preservation of the estate and accorded the appellant right to remain on the suit land during the pendency of the said suit. That the orders so granted, would operate as stay orders. Counsel also urged the court to stay any further proceedings herein awaiting the determination of the succession cause at Migori High Court.
 10. On the part of the 1st and 2nd respondents, their counsel filed submissions dated May 9, 2022 on May 10, 2022. Counsel submitted, *inter alia*, that the instant application offends the sub judice rule and is an abuse of the court process as the appellant has a pending application before the High Court in Migori Succession Cause No 27 of 2018. Counsel relied on various authorities including the case of *Republic –vs- Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* (2020) eKLR, in support of the submissions.
 11. Initially, the matter had been filed at the Environment and Land Court in Migori. However, the same was transferred to this court on November 23, 2022 when Kullow J recused himself on the basis that he is known to one of the parties herein.
 12. I have duly considered the application, the response thereto, the Preliminary Objection and the parties' respective submissions. The preliminary objection takes priority over the instant application. So, is the Preliminary Objection sustainable? What then is the fate of the instant application?



13. It must be noted that the Preliminary Objection is on a point of law and may dispose of the suit; see Mukisa Biscuits case (*infra*).
14. The Preliminary Objection is grounded on Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
15. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...”
16. Section 6 of [Civil Procedure Act](#) (*supra*) provides for the *sub-judice* doctrine as follows;

“...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..”
17. Essentially, the doctrine of sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties, pending before same or another court with jurisdiction to determine it.
18. In the case of [Kenya Bankers Association –vs- Kenya Revenue Authority](#) (2019) eKLR the court had this to say on the issue of *sub judice*;

“...In addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In Re the matter of the Interim Independent Electoral Commission, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...” (Emphasis laid)
19. The rationale behind sub-judice rule is to prevent a situation of having conflicting orders emanating from two or more different courts over the same subject matter. That is the mischief Section 6 of the [Civil Procedure Act](#) (*supra*) is supposed to cure by providing for a stay of suit or proceedings.



20. In the case of *David Ndiu & others –vs- Attorney General & Others* 2021 eKLR, the court inter alia stated;

“...The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts...”

21. The Supreme Court of Kenya in *Kenya National Commission on Human Rights –vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (2020) eKLR had occasion to pronounce itself on the subject of sub judice. It aptly stated: -

(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” 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.

22. In view of the foregoing, it is evident that for the doctrine of *sub judice* to apply the following principles ought to be present:-

- a. There must exist two or more suits filed consecutively
- b. The matter in issue in the suits or proceedings must be directly and substantially the same
- c. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title; and
- d. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

23. The above is the obtaining situation herein. Therefore, it is my considered view that the instant preliminary objection is merited. The same is hereby upheld.

24. To that end, the instant application is also untenable as I subscribe to Kakuta Maimai case (*supra*).

25. Notably, the appellant informed this court that the High Court at Migori in Succession Cause No. 27 of 2018 has since granted orders of preservation of the estate of Dr. Polycarp Erick Wambi (deceased) and accorded the appellant right to remain on the suit property during the pendency of the said suit. That the orders so granted, would operate as stay orders. Counsel also urged the court to stay any further proceedings herein awaiting the determination of the succession cause at Migori High Court.

26. Therefore, this suit is stayed pending the outcome of Migori High Court Succession Cause No 27 of 2018.

27. The costs of this application in entirety to be borne by the appellant/applicant.



28. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 25TH DAY OF JULY 2023.

G.M.A ONG'ONDO

JUDGE

Present

Mr. G. Akello, learned counsel for the 1st and 2nd respondents

Okello, Court Assistant

