



REPUBLIC OF KENYA



Oduol (Suing as the Administrator of the Estate of Theresa Grace Achieng Aloande K. Oduol) & 10 others v Athi Water Services Board & 3 others; Presidential Delivery Unit & 4 others (Interested Parties) (Environment & Land Petition 60 of 2019) [2023] KEELC 20369 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 60 OF 2019**

**LN MBUGUA, J
SEPTEMBER 28, 2023**

BETWEEN

**LOISE K ODUOL (SUING AS THE ADMINISTRATOR OF THE ESTATE OF
THERESA GRACE ACHIENG ALOANDE K. ODUOL) 1ST PETITIONER
MARGARET WANGARI (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF JOHN KAMAU NJENGA) 2ND PETITIONER
LAWRENCE OTIENDE LUMBASYO 3RD PETITIONER
THUTA INVESTMENT COMPANY LIMITED 4TH PETITIONER
LEONIDA F.A OMONDI 5TH PETITIONER
JOSEPH FREDRICK GATHII, ROBERT NICHOLAS ROGOI GATHII AND
OTHER (KEVIN GATHII) 6TH PETITIONER
ISAIAH NGO THO WATHEKA 7TH PETITIONER
PETER WAINANAINA 8TH PETITIONER
JOHN KINGORI KARIUKI 9TH PETITIONER
MARY WANJIRU NJIRAINI (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JAMES RAYMOND NJENGA) 10TH PETITIONER
ELIZABETH MWARI MAINGI 11TH PETITIONER**

AND

**ATHI WATER SERVICES BOARD 1ST RESPONDENT
MANAGATI I.B PATEL & PARTNERS LTD 2ND RESPONDENT
ZHONGMEI ENGINEERING GROUP LTD 3RD RESPONDENT**



ATTORNEY GENERAL 4TH RESPONDENT

AND

PRESIDENTIAL DELIVERY UNIT INTERESTED PARTY

KFW DEVELOPMENT BANK OF GERMANY INTERESTED PARTY

EUROPEAN UNION INTERESTED PARTY

LORESHO SOUTH RESIDENT ASSOCIATION INTERESTED PARTY

DEPUTY COUNTY COMMISSIONER, WESTLANDS INTERESTED PARTY

RULING

1. The 1st - 3rd Respondent's Notice of Motion application dated 30.5.2023 is for determination before this Court. They seek orders that this suit be struck out with costs and in the alternative, it be stayed pending hearing and determination of the case- Milimani ELC suit No. 306 of 2018 *Karolyne Mwachha Mburu and others v Athi Water Services Board and Water Resources Authority*.
2. The application is premised on grounds on its face and on the supporting affidavit sworn on 30.5.2023 by Felix Muuo, counsel in conduct of the suit on behalf of the 1st-3rd Respondents. He avers that this suit is similar to Milimani ELC No. 306 of 2018 filed on 3.7.2018 which arises from the same set of facts herein being the construction of the project known as; "Construction of Western Transmission (Kabete – Uthiru -Karen) Pipeline Lot-2 pipeline", under the 1st Respondent's contract No. AWSB / kfw NCD/ W /02 /2016.
3. He contends that in both suits, the suit properties are the Petitioners' parcels of land allegedly affected by the project, whereby the Petitioners seek similar orders.
4. Counsel also avers that Milimani ELC No. 306 of 2018 is scheduled for hearing on 13.12.2023, thus this suit filed on 9.8.2018 is subjudice and was filed in bad faith as a plan B in case the Petitioners don't obtain a favorable judgment in the former suit.
5. The Petitioners are opposed to the application vide the 7th Petitioner's replying affidavit sworn on 28.7.2023. He avers that the instant suit concerns issues pertaining to the rights of the Petitioners which cannot be canvassed in ELC 306 of 2018. He further avers that the issues for determination in both matters are not similar and that the parties are also varied.
6. He contends that on 10.7.2021, parties recorded a consent stating that ELC 306 Suit 2018 and the instant suit be heard on the same day without necessarily being consolidated or stayed whereby parties then proceeded to take directions on the two files.
7. In reply, the 1st-3rd Respondents filed a further affidavit sworn by Felix Muuo on 3.8.2023 denying the existence of any consent as alleged.
8. The 4th Respondent and the Interested Parties did not file responses to the application.
9. The application was canvassed by way of written submissions.
10. The 1st - 3rd Respondents' written submissions are dated 3.8.2023, where they contend that the instant suit and Milimani ELC 306 of 2018 raise an identical cause of action and that the parties are similar save that in this suit, there are additional Respondents and Interested Parties.



11. They rely on the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR to submit that a mere addition of parties in a subsequent suit does not render the doctrine of res subjudice inapplicable.
12. It is argued that the Provisions of Section 6 of the *Civil procedure Act* are mandatory in nature, thus this court does not have jurisdiction to continue with a matter that is sub-judice. They add that multiplicity of suits on the same matter constitutes abuse of the court process. The applicants have also relied on the following cases; *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others* [2022] eKLR as well as the Supreme Court’s decision in Supreme Court Advisory Opinion No. 1 of 2017 *National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 other (Interested Parties)* eKLR.
13. The Petitioners filed written submissions dated 10.8.2023, averring that the application does not meet the prerequisites set out at Section 6 of the *Civil Procedure Act*. They argue that even though the two cited matters arise from the same set of facts, the issues for determination are not similar and parties are also different.
14. The issue for determination is whether this suit is sub-judice to the suit Nairobi ELC No. 306 of 2018. The 1st - 3rd Respondents argue that the cause of action in this matter is similar to the cause of action in the other suit. The Petitioners argue that the reliefs sought in the two suits are different.
15. The court has perused the record and discerns that there is no consent recorded on 10.7.2021 as alleged by the petitioners.
16. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020]eKLR, the court stated that;

“... in determining whether or not sub judice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought.”
17. The substance of this claim relates to the project known as; “Construction of Western Transmission (Kabete-Uthiru-Karen) Pipeline Lot-2 pipeline”. The said project is also the subject matter in the suit Nairobi ELC No. 306 of 2018. The summary of the orders sought in Nairobi ELC No. 306 of 2018 are; A declaration that the invasion of the private properties of the plaintiffs was unlawful, that there be an order of injunction restraining the defendants from dealing with the plaintiffs’ properties as well as an alternative prayer for compensation and damages. These prayers are more or less the reliefs sought in the matter at hand. In the circumstances, I find that this suit offends the provisions of Section 6 of the *Civil Procedure Act*.
18. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties)* [2020] eKLR (*supra*) affirmed that;

“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 & diminish the chances of courts with competent jurisdiction, issuing conflicting decisions over the same subject matter.”



19. The rationale for the principle of the sub-judice rule was restated in the case of Kampala High Court Civil Suit No. 450 of 1993 - *Nyanza Garage v Attorney General*, cited in the case of [*ASL Credit Limited v Abdi Basid Sheikh Ali & another*](#) [2019] eKLR, in which the Court held that:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

20. This far, I find that there was no justification in the filing of this petition. In the circumstances, the application is hereby found to be merited. The petition is hereby struck out. Seeing that the dispute between the protagonists is still active albeit in the other case, I direct that each party is to bear their own costs of this suit.

21. Application dated 30.5.2023 is merited.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Ongong'a holding brief for Dr. Ogendi for the plaintiff

Muuu for 1st – 3rd Respondents

Court Assistant: Eddel

