



Kiprotich (Suing on behalf of the Estate of Kiplangat Arap Kerich) v Byegon (Being the administrator of the Estate of Linner Chepkoech Chumo) & 2 others (Environment & Land Case 13 of 2019) [2023] KEELC 20881 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20881 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 13 OF 2019
MC OUNDO, J
OCTOBER 18, 2023

BETWEEN

**JOSEPHAT KIPROTICH (SUING ON BEHALF OF THE ESTATE OF
KIPLANGAT ARAP KERICH) PLAINTIFF**

AND

**DIANA CHEMTAI BYEGON (BEING THE ADMINISTRATOR OF THE ESTATE
OF LINNER CHEPKOECH CHUMO) 1ST DEFENDANT**

**FAITH CHEBET (BEING THE ADMINISTRATRIX OF THE ESTATE OF
LINNER CHEPKOECH CHUMO) 2ND DEFENDANT**

**ACCESS BANK (KENYA) PLC (FORMERLY TRANSNATIONAL BANK
LIMITED) 3RD DEFENDANT**

RULING

1. By a Plaint dated 1st February, 2019, amended on 29th January 2021 and further amended on 27th October, 2021, the Plaintiff herein sought for judgment against the Defendants for cancellation of transfer and registration of land parcel No. Kericho/Kapsoit/620 (the suit property), in the name of the deceased, Linner Chepkoech so that it could be reversed to the name of Kipbiegon Arap Cheres, pending the filing of Succession Cause. He also sought a declaration that the charge in favour of the 3rd Defendant having been based on a bad title, the same be discharged unconditionally.
2. The 3rd Defendant filed its Statement of Defence and Counterclaim dated 4th February, 2022 whereby it sought for judgment jointly against the 1st and 2nd Defendants for a declaration that as personal representatives and/or administrators, they were liable to pay it the amount owed by the estate of the late Linner Chepkoech Chumo.



3. In response to the 3rd Defendant's Counterclaim, the 1st and 2nd Defendants filed a Preliminary Objection dated 13th March, 2023 contending that cases involving mortgages and charges were now a preserve of High Court's Commercial Division and that a matter involving the same subject matter and the same parties was pending before Kericho High Court in Civil Suit No. 6 of 2018 (Formerly Kericho ELC No.12 of 2015.) They sought for the dismissal of the said 3rd Defendant's Counterclaim, with costs.
4. The Plaintiff was exempted from participating in the Preliminary Objection upon his request.
5. Parties were directed to file their written submissions to dispose of the Preliminary Objection to which the 1st and 2nd Defendants filed their submissions dated 17th July, 2023 wherein they summed up the background of the facts before framing the issues for determination as follows:
 - i. Whether the court has jurisdiction to handle the matter
 - ii. Whether the counterclaim is sub judice.
6. On the first issue for determination, the 1st and 2nd Defendants explained that the instant counterclaim arose from the events of the year 2011 whereby the late Linner Chepkoech Chumo, whose estate they were now administering, had approached the bank and taken a loan of Kshs. 4,500,000/= which was then secured by a charge over land parcel No. Kericho/Kapsoit/620. They relied on a combination of the decision in the decided cases of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1 and Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR to submit that the court lacked jurisdiction to entertain the 3rd Defendant's counterclaim since the nature of the claim sought arose out of a commercial dispute. They thus urged the court to find that the instant suit entailed a commercial dispute which fell within the jurisdiction of the High Court's Commercial and Tax Division.
7. On the second issue for determination as to whether the instant suit was sub judice, the 1st and 2nd Defendants, while relying on a combination of the provisions of Section 6 of the *Civil Procedure Act* and the decision in the decided case of Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR submitted that the instant suit was sub judice since there was a pending case being High Court Civil Suit No. 6 of 2018 (Formerly ELC Civil Suit No. 12 of 2015) before the High Court at Kericho. That the subject matter was similar in both suits being loan facility acquired by the deceased Linner Chepkoech Chumo and the charge created thereto on land parcel No. Kericho/Kapsoit/620. That the parties were substantially the same in both suits where the prayers raised in the instant counterclaim were against the 1st and the 2nd Defendants. That the reliefs sought in both suits were substantially the same over the same subject property and the same parties and that both suits were pending before the court and therefore this suit was contrary to the provisions of Section 6 of the *Civil Procedure Act*.
8. The 1st and 2nd Defendants thus submitted that instant suit was a classical instance of sub-judice in all merits and standards and that the 3rd Defendant was forum shopping hence the court risked falling into the trap of sub-judice since the 1st and 2nd Defendants would be subjected to unending litigious process and waste the court's precious time. That the instant suit ought to be dismissed with the contempt it deserved.
9. While relying on the decision in the decided case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, the 1st and 2nd Defendants submitted that their Preliminary Objection satisfied the test set out in law, which required that a preliminary objection be based on pure points of



- law. Accordingly, the 1st and 2nd Defendants submitted that the instant suit ought to be dismissed or struck out with costs to the 1st and 2nd Defendants.
10. In response, the 3rd Defendant in its Submissions dated 17th July, 2023 summarized the factual background of the matter before framing one issue for determination to wit; whether the court had jurisdiction to handle the instant matter.
 11. The 3rd Defendant placed reliance on a combination of the provisions of Article 162 of *the Constitution*, Section 13 (2) of the *Environment and Land Court Act*, Section 150 of the *Land Act* and Section 101 of the *Land Registration Act* to submit that the Environment and Lands Court had jurisdiction to hear disputes relating to inter alia contracts, choses in action or other instruments granting an enforceable interest in land. That considering the nature of the instant suit, it was not in dispute that there existed a charge on the suit property and that the 1st and 2nd Defendants had failed to rectify the same.
 12. Further reliance was placed on the decision in the decided case of Lydia Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another [2018] eKLR to submit that the court had jurisdiction to deal with the instant suit as its jurisdiction inevitably covered all instruments created within the aforementioned statutes which also encompassed charges and generally all proprietary transactions.
 13. That in determining the issue of jurisdiction, the court should always look at the pre-dominant issue before it and that in the instant suit, the pre-dominant issue was on a charge over the suit property. Reliance was placed on a combination of decisions in the decided cases of Suzanne Achieng Butler & 4 Others vs. Redhill Heights Investment Limited & Another [2016] eKLR and Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another [2018] eKLR to emphasize that it was evident that the court had jurisdiction to hear and determine the instant matter to its conclusion.
 14. That the instant matter being a land matter relating to title, use and occupation, the Environment and Land Court was the right court with jurisdiction. That the High Court by dint of Article 165 (5) of *the Constitution* did not have jurisdiction to hear the aforementioned issues. That the 1st and 2nd Defendants who were the administratrix of the estate of the deceased Linner Chepkoech Chumo had defaulted in servicing the loan. That 3rd Defendant complied with all the requirements and followed the due process in registering the aforementioned charge hence the 1st and 2nd Defendants should be compelled to pay the said loan. To buttress this assertion, reliance was placed on the decision in the decided case of Mrao Ltd vs First American Bank of Kenya Ltd & others [2003] eKLR.
 15. The 3rd Defendant thus submitted that it had adduced sufficient reasons to persuade the court to exercise its discretion in its favour and dismiss the 1st and 2nd Defendant's preliminary objection with costs.

Determination.

16. Having considered the Notice of preliminary objection herein, the submissions and the authorities cited for and against the same thereof. I find that this matter arose as a result of a plaint filed by the plaintiff seeking judgment against the Defendants for cancellation of transfer and registration of land parcel number Kericho/Kapsoit/620 (the suit property), in the name of the deceased, Linner Chepkoech and that the title to the said land parcel No. Kericho/Kapsoit/620 be reversed to the name of Kipbiegon Arap Cheres, pending the filing of succession cause. He also sought a declaration that the charge in favour of the 3rd Defendant was based on a bad title and therefore the same be discharged unconditionally.



17. The matter was referred for arbitration wherein it had been agreed that the title to Kericho/Kapsoit/620 (the suit property), in the name of the deceased, Linner Chepkoech be cancelled and reversed to the name of Kipbiegon Arap Cheres and thereafter parties take out letters of administration in respect of his estate. The said agreement was adopted as an order of the court thus resolving the dispute between the Plaintiff and the 1st and 2nd Defendants leaving the 3rd Defendants counterclaim against the 1st and 2nd Defendants who then filed the current Preliminary objection.
18. Their argument is based in the fact that the counterclaim having arisen from the events of the year 2011 where the late Linner Chepkoech Chumo, (whose estate was now being administered by the 1st and the 2nd Defendants) approached the bank and took a loan of Kshs. 4,500,000/= which was then secured by a charge over land parcel No. Kericho/Kapsoit/620. That this court therefore had no jurisdiction to deal with matters pertaining charge and mortgages which were a preserve of the high court. That secondly, the matter was sub Judice High Court Civil Suit No. 6 of 2018 (Formerly ELC Civil Suit No. 12 of 2015) where a matter involving the same parties over the same cause of action was pending.
19. The 3rd Defendant has argued in the contrary wherein they have quoted authorities which in my humble opinion arise from decisions of courts of equal status and therefore their value is only persuasive.
20. I find the matter for determination as being:
 - i. Whether this court has the Jurisdiction to hear the matter.
 - ii. Whether the counterclaim is sub-judice High Court Civil Suit No. 6 of 2018 (Formerly ELC Civil Suit No. 12 of 2015)
21. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd (supra) was stated to be thus:-

“So far as I am aware, 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 the contract giving rise to the suit to refer the dispute to arbitration.”
22. In *Avtar Singh Bhamra & Another vs. Oriental Commercial Bank*, Kisumu High Court Civil Case NO. 53 of 2004, the Court held that:

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
23. From the above holding, it is clear that Preliminary Objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amount to abuse of Court process.



24. On the first issue whether this court has jurisdiction to determine the matter before it, the same having arisen out of a transaction involving a mortgage and charge, it had been held in the case of *The Owners of the Motor Vessel "Lilian S" –vs- Caltex (Kenya) Ltd* [1989] KLR 1, as follows:-

“...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. Section 13 of the *Environment and Land Court Act* gives the court power to hear and determine disputes relating to land use and other instruments granting any enforceable interests in land. We must ask ourselves what the predominant issue in the transaction was and if the answer would touch on land, then I agree that the court has jurisdiction to determine the matter herein. Reference is made to the case of *Lucy Nyambura* (Supra)

26. However there is a second challenge to dispose of; to wit whether the current matter is sub judice a pending matter in the High Court being Civil Suit No. 6 of 2018 (Formerly ELC Civil Suit No. 12 of 2015) The provisions of Section 6 of the *Civil Procedure Act* which provides 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.’

27. I find that there having been no argument in rebuttal, put forward by the 3rd Defendant that indeed there is a pending matter that is directly and substantially in issue with the present suit before the high Court between the same parties, this matter is therefore sub judice. I find that where the test of res sub judice is established or met, the marginal notes in Section 6 of the *Civil Procedure Act* stipulates that the latter suit would be stayed until the earlier suit is heard or determined. There can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the *Civil Procedure Act* which require under Section 1B that there be an “efficient use of the available judicial and administrative resources”.

28. The current suit, I find is an abuse of the court process the Preliminary Objection herein succeeds with the result that this latter suit is herein dismissed with costs to the 1st and 2nd Defendants.

It is herein ordered

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 18TH DAY OF OCTOBER 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

