



Abbas (Suing under the power of attorney through Mohamed Ali Nalishad Hussein) v Khamis & 7 others (Judicial Review Application 11 of 2022) [2023] KEELC 22401 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW APPLICATION 11 OF 2022
EK MAKORI, J
NOVEMBER 29, 2023**

BETWEEN

FATMA SAYED ABBAS (SUING UNDER THE POWER OF ATTORNEY THROUGH MOHAMED ALI NALISHAD HUSSEIN) APPLICANT

AND

**KHALID GULMOH'D KHAMIS 1ST RESPONDENT
MANGI CHARO YAA 2ND RESPONDENT
THE LAND REGISTRAR KILIFI 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 5TH RESPONDENT
SETTLEMENT FUND TRUSTEES 6TH RESPONDENT
NATIONAL LAND COMMISSION 7TH RESPONDENT
ATTORNEY GENERAL 8TH RESPONDENT**

RULING

1. The Applicant herein filed a Judicial Review Application dated the 25th of October 2022 together with a statutory statement of Mohamedali Naushadhusein Jiwa. In response to the Applicant's application the 3rd- 6th & 8th Respondents filed their grounds of opposition dated 13th March 2023 as well as the Notice of Preliminary Objection dated on the even date on the following grounds:
 - a. That in the application there are no new or novel issues raised to warrant the grant of orders sought in the judicial review application dated 25th October 2022.



- b. That this Court ((Olola J.) has already spoken its mind in the ruling delivered on the application dated 4th March 2021. This previous application is similar in form and substance to the current application.
 - c. That this application is res judicata as the substance and the matters herein have already been dealt with and the court made a pronouncement of the same in ELC No E8 of 2020 vide its ruling dated 9th June 2022 (Olola J.).
2. On the other hand, the 1st respondent is of the view That ELC Case No. E8 of 2020 is still pending and this matter offends the sub judice rule and therefore ought to be struck out.
 3. Parties were directed to file written submissions. I did not see submissions from the applicants. The respondents did comply.
 4. 1st respondent submitted That In the Notice of Motion in ELC Case No. E8 of 2020 the applicant sought among other orders, an order of injunction to be issued against the respondents restraining them from acknowledging the sale of the property by the 2nd defendant to the 1st defendant herein in respect to Kilifi/Madeteni/608, the same orders as sought in this application. That suit is still pending and offends the provisions of Section 1B of the *Civil Procedure Act* on the use of judicial time and resources. The 1st respondent has quoted the case of *Thiba Min Hydro CO. Ltd v Josphat Karu Ndwigwa* [2013] eKLR, elucidating That sub judice can be inferred from the substance of the suit and not the framing. The Courts must discourage litigation by installments.
 5. 3rd- 6th & 8th Respondents are of the view That ELC Case No. E8 of 2020 resolved the issues being raised here and That the current suit is res judicata. The Applicant also failed to appreciate That she was allowed to defend her claims before the Court, armed with the same facts as herein in Malindi ELC No E8 of 2020, which matter was dismissed and the court found no fault on the Defendants as to the registering, transferring, charging and discharging of the property Kilifi/Madeteni/608. It is in bad faith and an abuse of the court process for the Applicant to again try and revive a settled matter, by a competent court, on the basis That she did not get a favorable outcome. The decisions in the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017]eKLR, *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR and *Gurbachan Singh Kalsi vs. Yowani Ekori* Civil Appeal No. 62 of 1958, are quoted on the test in determining the doctrine of res judicata.
 6. What to determine is whether the Preliminary Objection raised herein is appropriate and whether the current suit is sub judice or res judicata
 7. The confines of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles That the Court is commanded to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. On page 700 Law JA stated:

“ 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 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.”



On page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

8. The following conditions must be met for a preliminary objection to be acknowledged: First and foremost, it must raise a clear legal issue; second, it is argued under the presumption That all of the facts presented by the opposing party are true; and third, it cannot be brought if any facts need to be established or if the exercise of judicial discretion is being requested. The lawsuit should be dismissed if a legitimate preliminary objection is granted.
9. The materials I have before me indicate That the applicant in this matter filed Malindi ELC No E8 of 2020, which is attached as part of the proceedings in this suit. On the 9th day of June 2022, this Court – Olola J. dismissed an application for injunctive orders stating as follows:

“ From the annexures attached to the 1st defendant’s replying affidavit, it was evident That the 2nd defendant duly complied with the offer given to him in 2012 and That on completion of the process, he was issued with a title deed for the suit property on 13th March 2017. As the holder of such title, the 2nd defendant had the legal authority to sell and transfer the property to the 1st defendant as he is said to have done vide the Sale Agreement dated 25th August 2017.

Arising from the foregoing, I was not persuaded That the plaintiff has made a prima facie case with probability of success at the trial and/or That she stood to suffer any irreparable damages or loss unless the orders sought were granted.”

10. I called for the physical file and reckon That it is still pending. After the Court declined to grant injunctive orders a letter was written to this Court to have the entire suit withdrawn. The letter was never acted upon hence, the suit is still pending.
11. As can be gleaned from That previous suit, the orders sought here are congruent with what the judicial review application intends to achieve - to call for the adjudication and SFT records and quash the same via mandamus. The applicant then is forum shopping having a second bite at the cherry oblivious of the judicial trail, this is what is called – abuse of the judicial process as well articulated by Wabwoto J. in Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR:

“ Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process.

30. The point to underscore is That a litigant has no right to pursue paripassu more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both. I have in previous decisions stated That litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly, and without tricks.



31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose, and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice”
12. At the ELC Malindi, we are grappling with a multiplicity of suits brought in all manner shades and forms, but with similar outcomes in mind. It tends to aid in the proliferation and convolution of suits with the attendant fatigue on the parties and the entire judicial chain. The judicial review application as filed offends not only the sub judice rule - which is geared to discourage similar suits pending in our Courts but also is an abuse of the judicial process rather than res judicata which is concerned with discouraging filing fresh suits on matters already fully and finally settled. In *Thiba Min Hydro CO. Ltd v Josphat Karu Ndwiga* [2013] eKLR, the Court held as follows:
- “It is not the form in which the suit is framed That determines whether it is sub-judice. Rather it is the substance of the suit and looking at the pleadings in both cases,”
13. In all four corners the current suit offends the sub judice rule as described in Section 6 of the *Civil Procedure Act* as follows:
- “No Court shall proceed with the trial of any suit or proceedings 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 other Court having jurisdiction in Kenya to grant the relief claimed”.
14. Malindi ELC No E8 of 2020 is still active and pending in this Court let all of us migrate there, The upshot is That the Preliminary Objection as raised by the 3rd - 6th & 8th respondents and supported by the 1st respondent is allowed on the ground of sub judice and abuse of the judicial process and the entire cause Judicial Review Application is struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 29TH DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

M/s Wanjau for the JR Applicant & Respondent to Preliminary Objection

Ms Mwaniki for the Applicant

Court Clerk: Happy

In the Absence of

AG for 3-6th , 8th Defendants

