



**Shah v Dhiman (Suing as the Legal Representative of the Estate of
Kanwal Sarjit Singh Dhiman) (Environment & Land Case E069 of 2023)
[2023] KEELC 21673 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E069 OF 2023
JA MOGENI, J
NOVEMBER 16, 2023**

BETWEEN

KESHAVJI JIVRAJ SHAH PLAINTIFF

AND

**MANJOYT KAUR DHIMAN (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF KANWAL SARJIT SINGH DHIMAN) DEFENDANT**

RULING

1. The plaintiff herein filed a notice of motion dated 1/09/2023 which sought summary judgment against the defendant as prayed in the plaint and the costs of the application. That application provoked a preliminary objection that was filed on behalf of the defendant dated 12/09/2023. The objection was in the following terms:-
 - i. The suit is incompetent as drawn and filed.
 - ii. The Honorable court is devoid of jurisdiction by reason of section and 6 of the [Civil Procedure Act](#).
 - iii. The suit is frivolous, misconceived, vexatious and without any merits.
 - iv. It is otherwise an abuse of the process of this honorable court and ought to be struck out/ dismissed in limine with costs to the defendant
2. Counsel for the applicant has urged the Court to issue a summary judgment maintaining that by a judgment delivered on 19/09/2019 the applicant was declared the owner of LR No 209/8292/8 Lavington, Nairobi vide Civil Suit No 205 of 1999. The defendant on the other hand applied for stay of execution of the decree in Civil Application No Nai 317 of 2019 and by a ruling dated 8/07/2022 the Court of Appeal issued a conditional stay of execution. The defendant/Appellant was directed to



file an appeal which had to be determined within 1 year before 2/08/2023. The stay however lapsed as computed in accordance with Rule 3 of the Court of Appeal Rules 2022.

3. Since neither the Memorandum of Appeal nor the Record of Appeal had been lodged in the Court of Appeal registry for determination by 2/08/2023 the conditional stay granted lapsed. It is the applicant's contention that there is no competent court that has set aside the judgement of the court dated 19/09/2019 nor the decree of the court dated 1/11/201. That the Court of Appeal gave a conditional order of stay of execution pending the hearing of Civil Appeal No 317 of 2019. The order of stay of execution pending appeal that was issued provided for the hearing of the appeal within one year of granting the stay order.
4. In response, to the application, the defendant filed a replying affidavit dated 15/08/2023 and a Preliminary Objection dated 12/09/2023. The respondent contended that the application as filed offends the provisions of the *Civil Procedure Act* and rules made thereunder, and that the application is sub judice and is prematurely filed. This is because the Agreement and the judgment are the subject matter of the Appeal.
5. That the Court of Appeal granted a stay in Civil Application No NA E317 of 2019 but after one year it lapsed and the appeal has not been heard and determined at no fault of the respondent since there was delay to obtain typed proceedings on time. The respondent wrote to the Chief Justice and the Judiciary Ombudsman after several attempts to get the typed proceedings failed.
6. The respondent averred that he had filed an application for enlargement of time and parties have been issued with directions and so the plaintiff's application is premature, vexatious and an abuse of the court process and should be dismissed. He attached a copy of the Application of the enlargement of time marked as "MKD "6" (a) and (b)"
7. He also stated that the court has no jurisdiction to grant any relief sought since the plaintiff is non-suited in light of the of the fact that the ex parte judgment giving rise to the vesting order and registration of the suit property in the plaintiff's name was set aside. He attached a copy of the court's Judgment marked as "MKD7".
8. In addition to the replying affidavit the respondent also filed a Preliminary Objection where he stated that this court is devoid of jurisdiction by virtue of Section 6 of the *Civil Procedure Act*.
9. I have considered the application together with the respondent's Notice of Preliminary Objection, the written submissions and the responses filed thereto. The issues which in my opinion arise for determination and which can dispose of the application and together with the notice of preliminary objection is summarized are as follows: -
 - i. Whether the application filed herein is sub judice?
 - ii. What are the appropriate orders/remedies that can be issued herein?

Issue No 1. Whether the application filed herein is subjudice?

10. I will start by examining the issue of sub judice because it has been raised in the preliminary objection in relation to the application filed by the respondent. On what constitutes a Preliminary Objective, I will make reference to the often cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where it was held that:

“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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

11. Indeed, as revealed from the chronology of events in respect to the suit land, there is a pending appeal before the Appellate Court in Nairobi, being Appeal No E380 of 2023. The Appellant has filed an appeal against the decision by Justice Makau issued on 19/09/2019 having obtained a stay pending the hearing and determination of the appeal which however lapsed on 2/08/2023. That notwithstanding, the applicant herein came to this court asking it to declare that the applicant was entitled to the suit property having obtained a vesting order on 13/06/2006 to the suit property. In other words, he has asked this Court to issue a summary judgment confirming the vesting order issues and the judgment by Justice Makau.
12. It is clear that the suit land herein is the subject of the Appeal alluded to. If this Court were to issue the orders contrary to those issued by the superior court it would amount to issuing parallel orders and result in interfering with the substratum of the appeal. By law I am barred from doing so. Ultimately, I find that this court lacks jurisdiction to entertain this matter. I am left with no option but to down my tools.
13. A number of Courts hold that jurisdiction is everything and without it, the court must down its tools. In the case of the *Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Ltd* (1989) KLR1 the court held that:

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
14. This court also observed that the subject matter herein and the issues, that is to say, LR.No 209/8192/8 Lavington, Nairobi and ownership, are similar as those under litigation before the Court of Appeal. Therefore, to comment on, discuss and or hear and determine on them as proposed herein, would amount to engaging in sub judice.
15. The concept of sub judice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res judicata.
16. The respondent in the Preliminary Objection stated that this court is devoid of jurisdiction by virtue of Section 6 of the *Civil Procedure Act*. Section 6 of the *Civil Procedure Act* bars any court from engaging in matters sub judice before them. It 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.”

17. Justice Mativo (as he then was) discussed the concept of sub judice. This was in *Republic v Paul Kibara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR where he stated as follows:-

“...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”

18. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -

“(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.”

19. In the instant case, the parties herein are similar to those in Nairobi Appeal No E380 of 2023 Eldoret they share one thing in common: litigating over or against the same subject matter either on one side or opposites ones, and the expected outcome in the two courts one being a superior court and the other being a lower court but still with competence in jurisdiction automatically impact on the same subject matter. I will clarify the point as follows, in Milimani Commercial Case No 205 of 1999 which gave rise to the Civil Application No NAI 317 of 2019, which sought stay in HCCC No 205 of 1999 where the respondent was granted a conditional stay as long as the appeal had to be heard within one-year failure to which the stay would lapse, led to filing of Nairobi Civil Application No NAI E380 of 2023 since the appeal was not heard within one year as was directed
20. The respondent has stated that the reason he has filed Nairobi Civil Application No NAI E380 of 2023 is to show that they were dispossessed of the suit property without being given a chance to be heard. That there was no valid legal agreement that would pass as contract that led to the selling by public auction of the suit property which the applicant is laying claim to.



21. To avoid a situation where this court's orders would go contrary to the orders of the Court of Appeal I believe that I should respectfully down my tools and await the direction that the apex court shall issue in the pending appeal. I note that there is no stay order since it has lapsed and that the applicant being of an advanced age would want to enjoy the fruits of the favourable judgment issued but I cannot ignore the fact that the same judgment is the critical issue of concern in the appeal and the apex court will address this issue. Further, the Court of Appeal in issuing the lapsed stay had stated that the appeal needs to be filed and heard within a specific time frame which the appellant needs to adhere to and if the time taken will be inordinately long the applicant herein is at liberty to move to the apex court and seek to have the appeal struck out by operation of the law.
22. The issue raised in the Preliminary Objection before me is that this matter is sub judice for the reasons I have stated above. It is my considered view that sub judice issue is a matter of law which if argued as a preliminary point may dispose of the suit or an application. Consequently, it is my finding that although the application before the court is about a summary judgment concerning the suit property LR 209/8192/8 the appeal by the respondent in Civil Appeal E380 of 2023 is about the same suit property.
23. The matter is pending before the Court of Appeal so after a careful reappraisal of the application for summary judgment before this court, I am convinced that indeed that application is sub judice since there is an active pending suit before a court of the Court of Appeal Civil Appeal E380 of 2023 where the key issue raised in this application will certainly be addressed through the Appeal. I am also aware that there is no stay and that the orders for stay lapsed by 2/08/2023.
24. The law is settled that summary judgment may be entered where there is no plausible defence to save on court's precious time. However, summary judgment should only be entered in very clear cases. In *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR the Court of Appeal held that: Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term 'triable' as 'subject to liable to judicial examination and trial.' It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.
25. In the case of *Continental Butchery Limited v Samson Musila Ndura*, (Civil Appeal No 35 of 1997), the Court of Appeal stated: With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend
26. See also *Moi University v Vishva Builders Limited* (CA No 296 of 2004 and *Ternic Enterprises Limited v Waterfront Outlets Limited* [2018] eKLR).
27. As must have become evident by now, the application before me lacks merit and is for dismissal. Considering that I have held that the pendency of Civil Appeal No E380 of 2023 makes it impossible for this court to address the instant application and I agree with the respondent that this court has to down its tools.
28. Section 5 of the *Civil Procedure Act* lays the basis for the operation of Section 6 of the *Civil Procedure Act* by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For this reason, this court having



found that it is barred by the operation of law and in particular, Section 6 of the Civil Procedure Act, it lacks the requisite authority to hear and determine this suit.

Issue No 2. What orders to issue and who to bear costs

29. In the premises the preliminary objection is merited and is hereby allowed. The application is hereby dismissed with no order as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Muchangi Nduati for the Defendant / Respondent

Ms. Wanjiru for the Applicant

Caroline Sagina: Court Assistant

