



**Maina v Wamala (Environment & Land Case E154 of 2022)  
[2023] KEELC 22496 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22496 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E154 OF 2022**

**JO MBOYA, J  
DECEMBER 7, 2023**

**BETWEEN**

**MICHAEL WAITITU MAINA ..... PLAINTIFF**

**AND**

**ABDULRAHMAN WAMALA ..... DEFENDANT**

**RULING**

**Introduction And Background:**

1. Vide Notice of Motion Application dated the 26<sup>th</sup> October 2023, brought pursuant to inter-alia, the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; the Defendant/ Applicant herein has approached the Honorable court seeking for the following reliefs; (verbatim)
  - i. That the Honorable court be pleased to stay the proceedings herein as they offend the Doctrine of sub-judice.
  - ii. The costs of this Application be in the cause
2. The instant Application is premised and/or anchored on the various grounds which have been enumerated in the body thereunder. Furthermore the Application is supported by the affidavit by Abdulrahman Wamala, sworn on even date and in respect of which, same [ the Defendant/ Applicant], has reiterated the grounds alluded to at the foot of the Application.
3. Upon being served with the subject Application, the Plaintiff/Respondent responded thereto vide a Replying affidavit sworn on the 8<sup>th</sup> November 2023; and wherein the Deponent has averred inter-alia that the subject Application is not only misconceived, but same is calculated to delay, obstruct and/or defeat the expeditious hearing and determination of the instant suit.
4. Moreover, the instant Application came up for hearing on the 9<sup>th</sup> November 2023; when the advocates for the Parties covenanted to canvass and dispose of the Application by way of written submissions.



Consequently and in this regard, the Honourable court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. Pursuant to and in line with the directions by the court, the Defendant/Applicant herein duly filed written submissions dated the 15<sup>th</sup> November 2023 whilst the Plaintiff/Respondent filed written submissions dated the 21<sup>st</sup> November 2023.
6. For coherence, both sets of written submissions are on record.

### **Parties' Submissions:**

#### **A. Applicant's Submissions:**

7. The Applicant herein adopted and reiterated the contents of the grounds contained at the foot of the Application; and similarly reiterated the contents of the Supporting affidavit thereto.
8. Furthermore, Learned counsel for the Applicant thereafter proceeded to and raised, highlighted and amplified two [2] pertinent issues for due consideration by the Honourable court.
9. Firstly, Learned counsel for the Applicant has submitted that there is in existence a separate and distinct suit, namely, ELC Petition No. 47 of 2011 between Abdullahi Muiruri & Others vs The Attorney General & Others, which suit touches on and concerns ownership of the property otherwise known as L.R No. 11379/3.
10. Additionally, Learned counsel for the Applicant has contended that the dispute at the foot of the said Petition touches on and concerns, inter-alia, whether or not L.R No. 11379/3, was compulsorily acquired by the Government, prior to same being rendered available for alienation by and on behalf of the Commissioner of lands.
11. Other than the foregoing, Learned counsel for the Applicant has contended that L.R No. 11379/3, is the mother title to and in respect of L.R No. 15400/351, which is the suit property herein.
12. Consequently and in view of the forgoing, Learned counsel for the Applicant has therefore submitted that the proceedings and the eventual determination of the Petition, namely, ELC Petition No. 47 of 2011 between Abdullahi Muiruri & Others vs The Attorney General & Others, shall have substantial impact on the outcome of the instant suit.
13. Secondly, Learned counsel for the Applicant has submitted that to the extent that the suit property is said to have arisen and/or emanated from L.R No. 11379/3, it is therefore contended that the subject matter over and in respect of the suit is substantially and directly the same as the issues that are being ventilated in ELC Petition No. 47 of 2011.
14. To this end, Learned counsel for the Applicant has thereafter averred and submitted that same has been able to establish and demonstrate the nexus between the instant suit and the previous one, namely, ELC Petition No. 47 of 2011.
15. Thirdly, Learned counsel for the Applicant has submitted that even though the Plaintiff herein is not a Party to, namely, ELC Petition No. 47 of 2011, the person who sold the suit property to the Plaintiff/Respondent, procured and obtained the title from the original property and hence it can be contended that the Plaintiff herein has an indirect interest in the proceedings vide, namely, ELC Petition No. 47 of 2011.
16. Arising from the foregoing submissions, Learned counsel for the Applicant has thereafter invited the Honourable court to find and hold that the Applicant has established and demonstrated the requisite



ingredients that underpin the plea of Res Sub-judice as provided for by dint of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.

17. Further and in any event, Learned counsel for the Applicant has also cited and relied on the decision in the case of Kenya National Commission on Human Rights vs Attorney General; IEBC & 16 Others (Interested Parties) (2020)eKLR, where the Honorable court elaborated upon the requisite ingredient which underpin the plea of sub-judice.
18. In view of the foregoing, Learned counsel for the Applicant has therefore impressed upon the Honourable court to find and hold that the instant Application is meritorious and thus worthy of being allowed.

#### **B. Respondent's Submissions:**

19. The Respondent herein filed written submissions dated the 21<sup>st</sup> November 2023; and in respect of which same adopted and reiterated the contents of the Replying affidavit and thereafter same proceeded to highlight/ canvass two [2] salient issues for consideration by the Honourable court.
20. First and foremost, Learned counsel for the Respondent has submitted that the Parties to and in respect of the subject matter are separate and distinct from (sic) the Parties at the foot of, namely, ELC Petition No. 47 of 2011 between Abdullahi Muiruri & Others vs The Attorney General & Others.
21. Other than the foregoing, Learned counsel has also submitted that the issues that are in dispute over and in respect of the instant matter are also distinct from the issues which are substantially and directly in dispute vide ELC Petition No. 47 of 2011.
22. To the extent that the issues herein are separate and distinct from the ones that are being canvassed vide ELC Petition No. 47 of 2011, the Respondent herein has submitted that the plea of Res sub-judice, which has been invoked and cited by the Applicant herein, is not only misconceived but same is legally untenable.
23. Secondly, Learned counsel for the Respondent has submitted that prior to and before invoking and applying the Doctrine of Res-sub-judice, it behooves the court to discern and decipher that all the requisite ingredients bespoken to at the foot of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, are evident, reflected and discernable.
24. Furthermore, Learned counsel for the Respondent has submitted that the ingredients to be established and demonstrated prior to and before a successful plea of res-sub-judice, can be relied on must be proved conjunctively and not otherwise.
25. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied , inter-alia, the case of Kinatwa Cooperative Savings & Credit Society Ltd vs Kinatwa Prestige Ltd (2021)eKLR, Daniel Kipkemoi Bet & Another vs Joseph Rono (2022)eKLR, Republic vs Paul Kihara Kariuki, Attorney General & 2 Others , Ex-parte Law Society of Kenya (2020)eKLR and Kenya National Commission on Human Rights vs The Attorney General; IEBC & 16 Others (2020)eKLR, respectively.
26. Lastly, Learned counsel for the Respondent has submitted that the instant Application by and on behalf of the Applicant is a deliberate, albeit calculated ploy meant to frustrate the expeditious hearing and determination of the dispute beforehand.
27. Consequently, Learned counsel for the Respondent has submitted that the intentions of the Applicant is not to have the suit heard and/or determined, or at all.



28. Further and in any event, Learned counsel has contended that an order of stay of proceedings, like the one being sought by and on behalf of the Applicant herein, has the likely effect of delaying, obstructing and/or otherwise defeating the expeditious hearing and determination of the matter under reference.
29. In support of the foregoing submissions, Learned counsel for the Respondent has invited the Honourable court to take cognizance of the decision in the case of Kenya Wildlife Service versus James Mutembei (2019)eKLR and Watu Credit vs Geoffrey Mokaya Amboki & Another (2022)eKLR, respectively.
30. In a nutshell, Learned counsel for the Respondent has thus implored the Honourable court to find and hold that the instant Application, is not only frivolous and vexatious, but same constitutes a deliberate ploy to frustrate, obstruct and defeat the expeditious hearing and determination of the suit.

### **Issues For Determination**

31. Having analyzed the Application beforehand and the Responses thereto; and upon taking into consideration the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination.
  - i. Whether the issues over and in respect of the instant suit are the same/similar to the issues Directly at the foot of, namely, ELC Petition No. 47 of 2011 between Abdullahi Muiruri & Others vs The Attorney General & Others or at all.
  - ii. Whether the Applicant herein has established and demonstrated the existence of the requisite ingredients to warrant the grant of an order of Stay of Proceedings, either as sought or at all.

### **Analysis And Determination**

#### **Issue Number 1 Whether the issues over and in respect of the instant suit are the same/similar to the issues Directly at the foot of namely ELC Petition No. 47 of 2011 between Abdullahi Muiruri & Others vs The Attorney General & Others or at all.**

32. It is common ground and there is no denial that the instant suit touches on and concerns ownership over L.R No. 15400/351 [hereinafter referred to as the suit property]. Further and in any event, the ownership dispute pits the Plaintiff on one hand; and the Defendant on the other hand.
33. Other than the foregoing, it is also worthy to state and underscore that neither the Honorable Attorney General; nor Kiambu Dandora Farmers Company Ltd, are Parties to the instant suit.
34. Arising from the foregoing, the question that does arise and which merits due consideration and ultimate adjudication thus relates to whether it can be contended that the instant suit (which is between the Plaintiff and the Defendant); can be said to be the same and/or similar to ELC Petition No. 47 of 2011.
35. Instructively and for good measure, it is worthy to state that the Parties in respect of the two suits/proceedings, are separate and distinct.
36. Similarly, the dispute and/or property in dispute, is also separate and distinct. In this respect, what is being disputed beforehand, namely, L.R No. 15400/351, is not the same as L.R No. 11379/3,[ the latter], which is the bone of contention in respect of the Petition.



37. Other than the foregoing, there is also no gainsaying that the cause of action raised and ventilated in respect of the instant matter, is separate and distinct from what is being canvassed in ELC Petition No. 47 of 2011.
38. Consequently, the issues that underpin the instant suit, cannot by any figment/ stretch of imagination, be contended to be issues that could very easily be raised and/or canvassed in the previous suit.
39. Lastly, it is also worthy to recall that neither the Plaintiff nor his legitimate representative, is a Party to and in respect of ELC Petition No. 47 of 2011, [sic] to warrant a contention that the Plaintiff herein is being represented in the previous suit by a Legal Representative, or otherwise.
40. Owing to the foregoing, it is therefore difficult to discern and/or ascertain the substratum of the Applicant's submissions that the two suits, namely, ELC E154 of 2022 (instant suit), duplicates ELC Petition No. 47 of 2011, otherwise referred to as the previous suit.
41. Pertinently, the two suits beforehand are notably separate and distinct and hence it cannot be said that the issues before the instant suit will be heard and determined in the previous suit or otherwise.
42. Consequently and in the premises, I find and hold that the Applicant herein has failed to establish and or demonstrate any nexus and/or similarity between the instant suit and the previous suit, the latter which forms the basis of the instant Application.
43. Further and in any event, it is not lost on this Honourable court that insofar as the Applicant is the one, who was seeking to ride on the basis of the plea of Res-sub-judice, then it behooved the Applicant, to place before the Honorable court cogent, plausible and credible evidence, to enable the court to indeed find and hold that a basis, in terms of res-sub-judice, has been proved and/or satisfied. [See Sections 107, 108 and 109 of the [Evidence Act](#), Chapter 80 Laws of Kenya].

**Issue Number 2 Whether the Applicant herein has established and demonstrated the existence of the requisite ingredients to warrant the grant of an order of stay of proceedings, either as sought or at all.**

44. Suffice it to point out that an order of stay of proceedings, whether issued on the basis of the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya; or such other provisions of the law, inter-alia pending the hearing and determination of an appeal, would ordinarily have a serious impact and consequence on the general administration of Justice.
45. Further and in addition, it is also worthy to point out that prior to and before a court of law can stay and/or suspend proceedings on the basis of sub-judice, or such other provisions of the law that underpin stay of proceedings, it is incumbent upon the court to evaluate, appraise and/or consider, the impact of such an order on the general hearing and determination of the suit that is sought to be stayed and the necessity to afford all the litigants, [the Plaintiff/ Respondent herein not excepted], a right of access to justice.
46. Taking the foregoing into account, it is therefore worthy to underscore that an order for stay of proceedings, like the one beforehand, ought not to be granted and/or issued, unless the Honourable court is convinced that undue prejudice and/or grave injustice, shall arise and/or accrue, taking into account the evidence on record.
47. Furthermore, it is important to point out that where one, in this case the Applicant, seeks to procure an order of stay on the basis of the existence of a previous suit, it is the duty of such a Claimant to show and/or demonstrate to the court that all the requisite ingredients alluded to and underpinned



by the provisions of Section 6 of the *Civil procedure Act*, have been duly highlighted, established and or displayed.

48. Nevertheless and to the contrary, the Applicant herein has failed to demonstrate and/or to prove not even a salutary issue, to show and/or satisfy that same merits an order of stay of (sic) the subsequent suit, pending the further hearing of what is touted to be the previous suit.
49. As concerns the requisite ingredients that must be demonstrated prior to and or before a court of law, [the instant court not excepted], can grant an Order of stay of proceedings on the basis of sub-judice, were alluded to and elaborated upon by the Supreme Court of Kenya vide the case of Kenya National on Human Rights Commission vs Attorney General; IEBC & 16 Others (2020)eKLR, where the court stated and held thus;
  - (67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> 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.
50. Furthermore, the meaning import and tenor of what constitutes Res sub-judice was also reverted to and highlighted in the case of Republic versus Paul Kiahara Kariuki & 2 Others, Ex-parte Law Society of Kenya (2020)eKLR, where the Honorable Judge stated and held thus;
  19. In order to check this very problem, 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.
  20. In this regard, section 6 of the *Civil Procedure Act*<sup>[6]</sup> expressly provides that 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.
  22. The mere addition of a party or parties does not alter the pith and substance of the suit. The Black’s Law Dictionary<sup>[7]</sup> defines lis pendens, as a Latin expression which simply refers to a “pending suit or action.” The Oxford Dictionary of Law<sup>[8]</sup> defines the expression in similar terms. In the context of Section 6 of the *Civil Procedure Act*<sup>[9]</sup> which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is



between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

51. In my humble view, a Claimant who seeks to invoke and apply the Doctrine of Res-sub-judice, must conjunctively establish and demonstrate that there is in existence a previous suit between the same Parties as the one in the current suit; prove that the Issues that are substantially and directly in dispute in the previous suit are the same as the ones beforehand; and prove that the courts before which (sic) the two suits are pending,[ if at all], are seized of the requisite Jurisdiction.
52. From the foregoing, it is common ground that a Claimant is not merely to pick up the existence of some sort of suit, [if any], existing between some Parties and thereafter throw same on the face of the court, with a view to defeating the scheduled hearing of a particular matter, which has no nexus to and/or relevance with (sic) the previous suit.
53. Sadly, in respect of the instant matter the Applicant herein has referenced ELC Petition No. 47 of 2011, to be the previous suit, upon which the plea of res-sub-judice is premised and or anchored. Nevertheless, there is no gainsaying that the Parties via ELC Petition No. 47 of 2011 and the issues which are substantially/directly in dispute thereunder, are separate and distinct from the ones obtaining at the foot of the current suit.
54. Consequently and in this regard, the question that does arise is whether the current suit, which has no relationship to the previous suit, can (sic) be stayed under the guise and/or pretext that the determination of ELC Petition No. 47 of 2011, will have [sic] monumental impact on the outcome herein.
55. Finally, it is instructive to point out that the suit herein cannot be stayed allegedly on the basis of the plea of Res sub-judice, yet the Parties to the instant suit, including the Defendant/Applicant himself, are not Parties in ELC Petition No. 47 of 2011; and hence shall not have a right to be heard in the said previous suit.
56. In short, I come to the conclusion that the Applicant herein has neither established nor demonstrated the requisite ingredients that underpin the Doctrine of res-sub-judice, to warrant the grant of the orders of stay of proceedings, either as sought or at all.
57. Before departing from the issue herein, it is worthy to observe that an order of stay of proceedings, like the one beforehand, has the net effect of suspending and/or staying the proceedings and thus impacting on the Constitutional dictates which requires suits/proceedings to be heard and disposed of without undue delay.
58. Arising from the foregoing, it therefore behooves all courts, [the instant court not excepted], to ensure that orders of stay of proceedings, if any, are granted sparingly and with necessary circumspection, taking into account the import and tenor of Articles 48, 50(1) and 159 (2)(b) of *the Constitution* 2010.
59. Remarkably, the necessity to have suits and disputes filed before the court(s) heard and determined without undue delay has since been highlighted, amplified and elaborated upon by the Honorable Court of Appeal in the case of Said Sweilem Gheithan Saanum versus Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the court stated as hereunder;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are



reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

60. In a nutshell, my answer to issue number two [2] is twofold. Firstly, the Applicant herein has neither established nor demonstrated the requisite ingredients that underpinned the plea of Res-sub-judice, either as elaborated vide the provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya or at all.
61. Secondly, it is evident and apparent that the instant Application and the invocation of the doctrine of res-sub-judice, was intended to delay, obstruct and/or otherwise defeat the expeditious hearing of the instant matter and by extension, to accrue undue mileage to the Defendant/Applicant, who is (sic) being accused of having trespassed onto the suit property, to the detriment of the Plaintiff/Respondent.

**Final Disposition:**

62. From the foregoing discourse [details in terms of the preceding paragraphs], there is no gainsaying that the Applicant herein, who was duty bound to establish and demonstrate the requisite ingredients that underpin the Doctrine of res-sub-judice, has failed to do so.
63. Consequently and in the premises, there is no gainsaying that the Application beforehand, namely, the Application dated the 26<sup>th</sup> October 2023; is devoid and bereft of merits.
64. In a nutshell, same [ Application], be and is hereby Dismissed with costs to the Plaintiff/Respondent.
65. It so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**OGUTTU MBOYA,**

**JUDGE**

In the Presence of

Benson Court Assistant.

Mr. Manyara for the Defendant/Applicant.

Mr. Macharia for the Plaintiff/Respondent.

