



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E077 OF 2021

SAMUEL MUSAU KIOKO1ST PLAINTIFF

DOMITILA KANINI MULATA.....2ND PLAINTIFF

JOYCE NDULU NGUMBI.....3RD PLAINTIFF

(Suing as the administrators of the estate of KIOKO MULATA)

VERSUS

LUKENYA RANCHING & FARMING

CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

JOHNSON WAMBUA NDONYE.....2ND DEFENDANT

ESTATE OF JONATHAN KAVATHA NDOLO.....3RD DEFENDANT

IRENE NGIMA MURIITHI.....4TH DEFENDANT

PURPLE BLUE LIMITED.....5TH DEFENDANT

REGISTRAR OF LANDS MACHAKOS COUNTY.....6TH DEFENDANT

AND

JOHN ROBERT MUTISO.....1ST INTERESTED PARTY

IRENE KANINI WAMBUA.....2ND INTERESTED PARTY

CYRUS KIBE THUO.....3RD INTERESTED PARTY

PATRICK WACHIRA THIONGO.....4TH INTERESTED PARTY

MICHAEL NJAGI NGUNUNGU.....5TH INTERESTED PARTY

DAVID N. NJENGA.....6TH INTERESTED PARTY

JULIUS W. MURITHI.....7TH INTERESTED PARTY

MIKA MAINA GATHURU.....8TH INTERESTED PARTY

MWAI GERALD MUITA.....9TH INTERESTED PARTY

JAMES MURITHI NGOCHI.....10TH INTERESTED PARTY

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| PATRICK MURIUKI M..... | 11 TH INTERESTED PARTY |
| JAMES NGATIA THUMBI..... | 12 TH INTERESTED PARTY |
| DANSON KAHORO MAINA..... | 13 TH INTERESTED PARTY |
| JAMES KINGORI WANJOHI..... | 14 TH INTERESTED PARTY |
| MOSES MBURU WATHUO..... | 15 TH INTERESTED PARTY |
| HOSEA KIPTOO LANGAT..... | 16 TH INTERESTED PARTY |
| DAVID KAMAU GATHUNGU..... | 17 TH INTERESTED PARTY |
| SAMUEL WAWERU WACHIRA..... | 18 TH INTERESTED PARTY |
| CHARLES MWANGI KAMAU..... | 19 TH INTERESTED PARTY |
| ABRAHAM MAINA WACHIRA..... | 20 TH INTERESTED PARTY |
| JANE WANGARE KARIUKI..... | 21 ST INTERESTED PARTY |
| JOSEPH MUTHEE NDERITU..... | 22 ND INTERESTED PARTY |
| NICILAS KARWERU KIRAGU..... | 23 RD INTERESTED PARTY |
| DENIS OTIENO OCHIENG..... | 24 TH INTERESTED PARTY |
| SAMUEL GITAU NGUGI..... | 25 TH INTERESTED PARTY |

RULING

What is before Court for determination is the 2nd, 3rd and 5th Defendants' Notice of Motion application dated the 17th September, 2021 and 4th Defendant's Notice of Motion application dated the 5th October, 2021. In the application dated 17th September, 2021, the 2nd, 3rd and 5th Defendants seek the following orders:

1. *That this suit be struck out with costs to the 2nd, 3rd and 5th Defendants.*
2. *That any further orders that meet the end of justice regarding this Application be made forthwith.*

The application is premised on the grounds on the face of it and the supporting affidavit of JOHNSON WAMBUA NDONYE. The Deponent avers that the matter in issue in this suit which involves ownership of title number Mavoko Town Block 3/2038 hereinafter referred to as the 'suit property' is directly and substantially in issue in *Machakos ELC Case No. 41 of 2013 Jonathan Kavutha Ndolo & Another V Robert Mutiso & 5 Others (formerly Machakos HCCC No. 35 of 2009)*, that was filed first. Further, the Plaintiffs in this suit are the Interested Parties in *Machakos ELC Case No. 41 of 2013* while the 1st and 3rd Interested Parties are the Defendants in the said suit. The proceedings in *Machakos ELC Case No. 41 of 2013* are at the Pre trial Conference Stage and the Plaintiffs therein are keen in having the same ultimately heard and determined. Further, in *Machakos ELC Case No. 41 of 2013*, the Court issued an order on 9th October, 2014 directing that '*status quo be maintained*' with respect to the suit property but the Plaintiffs including the 1st & 3rd Interested Parties have constructed illegal structures, cultivated as well as destroyed vegetation thereon. The Plaintiffs are seeking to set aside the order of 9th October, 2014 through the back door by instituting the instant suit and abuse the court process. The Plaintiffs Notice of Motion application dated the 6th August, 2021 and the entire suit is thus incompetent, frivolous and *mala fides*.

In the 4th Defendant's Notice of Motion application dated the 5th October, 2021, she seeks the following orders:

1. *Spent*
2. *The Plaintiffs' suit be struck out.*
3. *In the alternative to prayer 2 above, the Plaintiffs suit be stayed pending the hearing and determination of the suit in Machakos ELC Case No. 41 of 2013 (formerly Machakos High Court Civil Suit No. 35 of 2009); Jonathan Kavutha Ndolo & 2 Others Versus Robert Mutiso & 5 Others.*

4. *The costs of the suit and this application be awarded to the 4th Defendant.*

The application is premised on the grounds on the face of it and the supporting affidavit of IRENE NGIMA MURIITHI where she explains that the 2nd, 3rd and 4th Defendants instituted Machakos ELC 41 of 2013 seeking various reliefs against the 1st, 2nd and 3rd Interested Parties. The Plaintiffs herein filed an application for joinder on the 17th April, 2009 seeking to be joined in Machakos ELC 41 of 2013 claiming beneficial interest over the suit property, which application was allowed by consent of the parties. Further, the Plaintiffs filed an application dated 29th September, 2009 seeking to take out Third Party Notice against the 1st Defendant herein, which Order was issued on 9th October, 2014 and 1st Defendant served. The Plaintiffs filed their Defence in Machakos ELC 41 of 2013 on 19th November, 2014. Further, the issue in dispute in the said pending suit is whether the Plaintiffs are entitled to ownership and occupation of suit property which matter is also in issue in the instant suit. This suit was filed in bad faith and the Plaintiffs are guilty of material non-disclosure having failed to disclose to the court crucial facts regarding it.

The Plaintiffs opposed the applications dated the 17th September, 2021 and 5th October, 2021 by filing two replying affidavits sworn by SAMUEL MUSAU KIOKO where he provided a background of Machakos ELC Case No. 41 of 2013 and insists that they never instituted the said suit. He claims their erstwhile Advocate who handled the matter on their behalf did not provide them with an update of the said suit. He confirms they filed this instant suit as Administrators of their late father's estate seeking to recover the family's land being LR No. Mavoko Town Block 3/2038, which they allege was obtained fraudulently by the 2nd and 3rd Defendants in collusion with the 1st and 2nd Defendants. He avers that the two applications are devoid of merit as the present Plaintiffs were joined in Machakos ELC Case No. 41 of 2013 as Interested Parties and the claim therein is for trespass. Further, the Plaintiffs' claim for ownership of suit property would have no platform for interrogation. He contends that they have been in occupation and possession of the suit property for the last 30 years while the instant suit has roped in Purple Blue Limited as well as the Registrar of Lands Machakos County. Further, the 4th to 25th Interested Parties are not parties to the subsisting suit hence the issue of sub judice would not apply. He reiterates that the 4th Defendant acquired the suit property while the initial suit was still pending contrary to the principle of *Lis Pendens*. He insists the applications seek to scuttle the instant suit and the Court should be very cautious in striking it out. Further, there is a remedy to consolidate the two suits.

The 2nd, 3rd and 5th Defendants filed a supplementary affidavit sworn by JOHNSON WAMBUA NDONYE in support of the 4th Defendant's application dated 17th September, 2021 and insists this suit is subjudice as the Plaintiffs herein participated in the earlier suit and the suit property is one and the same.

The two applications were canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the two Notice of Motion Applications dated the 17th September, 2021 and 5th October, 2021, respective parties' affidavits and rivalling submissions, the following are the issues for determination:

- *Whether this suit is sub judice and should be struck out with costs to the 2nd, 3rd, 4th and 5th Defendants.*
- *Whether Machakos ELC Case No. 41 of 2013 should be consolidated with this suit.*

I will deal with these issues jointly.

The 2nd, 3rd and 5th Defendants in their submissions reiterated their claim and contended that this suit offends the doctrine of sub judice and as such an abuse of the court process. They insist this suit should not be consolidated with the earlier suit. To buttress their averments, they have relied on the following decisions: *Kenya National Commission on Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties), Advisory Opinion Reference No. 1 of 2017; Republic V Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya (2020) eKLR; Barclays Bank of Kenya Ltd Vs Elizabeth Agidza&2 others (2012) eKLR and Law Society of Kenya V The Centre for Human Rights and Democracy & 12 Others (2014) eKLR.*

The 4th Defendant in her submissions reiterates that this suit is sub judice. She contends that the suit against her was filed on 6th August, 2021. She submits that this suit amounts to an abuse of the Court process. To support her arguments, she has relied on the following decisions: *Republic V Registrar of Societies Kenya & 2 Others Ex parte Moses Kirima & 2 Others (2017) eKLR; Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwigwa (2013) eKLR; Kiama Wangai V John Mugambi & Another (2012) eKLR; Anthony Muthumbi Wachira V Kenya Airports Authority Cause No. 1590 of 2010; Nairobi HCC No. 94 of 2003 Kenline Agencies Limited V Barclays Bank of Kenya Limited (unreported); Republic V Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya (2020) eKLR and Alcop Limited V Mako Ali & 2 Others (2017) eKLR.*

The Plaintiffs in their submissions insist this suit is not sub judice as the parties are not the same in terms of capacity of suing while the issues and reliefs sought in both suits are varied. Further, they were mere Interested Parties in the previous suit. They explain that some parties are different and their respective claims also varied. They aver that the 5th Defendant was not a party to the former suit and fraud has been pleaded against the 6th Defendant. Further, the present suit contains an additional twenty-two (22) parties who have purchased portions of the suit property. They state that the two applications do not meet the threshold set for striking out suits and request for the said two suits to be consolidated. To support their averments, they have relied on the following decisions: *Peeraj General Trading & Contracting Company Limited & Another Vs Mumias Sugar Company Limited (2016) eKLR and Dickson Maina V Kenya Electricity Generating Company Limited & Another (2021) eKLR.*

In this instance, the 2nd, 3rd, 4th and 5th Defendants contend that this suit is sub judice as the issues in dispute are pending in the *Machakos ELC Case No. 41 of 2013*. They explain that the matter in issue in this suit which involves ownership of title number Mavoko Town Block

3/2038 is directly and substantially in issue in Machakos ELC Case No. 41 of 2013 that was filed first.

On perusal of the two suits, I note in Machakos ELC 41 of 2013, in the Amended Plaint dated 1st October, 2018, the 3rd Plaintiff who is the 4th Defendant herein claims to have been an innocent purchaser for value and without notice. Further, the 1st and 2nd Plaintiffs confirm they sold suit property to 3rd Plaintiff and transferred it on 2nd April, 2009. The 3rd Plaintiff contends that the Defendants and Interested parties have trespassed on her land by constructing illegal structures thereon, cultivating it including destroying vegetation. The Plaintiffs hence sought for the following orders:

- a) *A permanent injunction to restrain the Defendants either by themselves, their agents and servants or any other person claiming under or through them from entering into, trespassing, constructing illegal structures, cultivating, destroying vegetation or in any other manner interfering with Land Title Number MAVOKO TOWN BLOCK 3/2038 (Now Subdivided into Mavoko Town Block 3/6501, 6502, 6503, 6504, 6505, 6506, 6507, 6508 respectively).*
- b) *General Damages for trespass.*
- c) *An order of eviction of the Defendants, their agents or servants or any other person claiming through or under them and an order that the Officer Commanding the nearest Police Station to assist in the eviction of the said persons from the suit property.*
- d) *Costs of this suit.*
- e) *Interest on (a) and (c) above at court rates.*

Further, in the instant suit the Plaintiffs have sued as administrators of the estate of Kioko Mulata who died on 14th September, 2000. They claim he was a shareholder of the 1st Defendant who allotted him the suit property on 15th June, 1991 and he was issued with a Letter of Allotment to that effect. They claim the deceased took possession of the suit property and commenced cultivating it. Further, that on 8th January, 2009, the 2nd and 3rd Defendants got registered as owners of the suit property which they disposed to the 4th Defendant on 2nd April, 2009 that later subdivided it, as well as transferred some portion to the 5th Defendant. They aver that the 1st Defendant fraudulently transferred suit property to the 2nd and 3rd Defendants. The Plaintiffs sought for the following orders:

1. *A declaration that LR Mavoko Block 3/2028 belongs absolutely to the late Kioko Mulata and should be registered in the names of the Plaintiffs.*
2. *A declaration that the 1st, 2nd, 3rd, 4th and 5th Defendants and any other person claiming or demanding title under them over the suit property has no valid claim thereon.*
3. *An order directed that the 6th Defendant cancels any and all titles issued to 3rd Parties in respect of the family land LR No. Mavoko Town Block 3/2038 including the titles emanating from the subdivisions that were conducted by the 4th Defendant.*
4. *An order directed that the 6th Respondent to register the land known as LR Mavoko Town Block 3/2028 in the name of the Plaintiffs to enable them to distribute the same to the estate of Kioko Mulata and its creditors including interested parties.*
5. *A permanent injunction restraining the 1st, 2nd, 3rd, 4th and 5th Defendants by themselves, their servants, employees, agents or any party claiming title under them, from trespassing onto, appropriating, constructing upon, using and or in any other way of interfering with the Plaintiff's quiet possession and use of the suit property LR Mavoko Town Block 3/2038.*
6. *Any other relevant order or remedy that the Hon. Court may deem appropriate and justifiable in the circumstances.*

On the issue of sub judice, I wish to make reference to Section 6 of the Civil Procedure Act which 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.'

In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR* the Court observed that:

'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[6] 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... The mere addition of a party or parties does not alter the pith and substance of the suit. The Black's Law Dictionary[7] defines lis pendens,

as a Latin expression which simply refers to a “pending suit or action.” The Oxford Dictionary of Law[8] defines the expression in similar terms. In the context of Section 6 of the Civil Procedure Act[9] 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... Paraphrasing what I said in the above case, the key words in applying sub judice rule is that “the matter in issue is directly and substantially in issue in the previously instituted suit.” The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.’

See also the case of *Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR*.

In the current scenario, I note the previous suit is pending. The Applicants admit there are other parties who were joined in the current suit who were not in the previous suit. I note the suit property no longer exists as it has since been subdivided and portions disposed to third parties. Further, I note the instant case mainly focusses on the root of the title while the previous one is on trespass. To my mind the issues raised in the instant suit which were not in the previous suit cannot be wished a way. I further note that the Plaintiffs herein have sued as administrators as well as beneficiaries of their father’s estate and seek to recover the deceased land. In the instant suit the Plaintiffs have also included a claim against the Land Registrar, Machakos.

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the decisions of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR*; and *Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR*, I find that this suit though related to the previous suit is not sub judice. I opine that this suit does not amount to an abuse of the court process. Further, in reference to the case of *Ramji Megji Gudka Ltd -vs- Alfred Morfat Omundi Michira & 2 Others [2005] eKLR* after careful consideration of the two suits, I will decline to strike out the instant one. It is my considered view that since the two suits are related and noting that the suit property has since been subdivided and disposed to different purchasers, for purposes of expeditious disposal of this case, I find that it is pertinent if the two matters were consolidated and will make an order to that effect.

In the circumstance, I find the two Notice of Motion applications dated the 17th September, 2021 and 5th October, 2021 unmerited and will disallow them. I will proceed to make an order that Machakos ELC Case No. 41 of 2013 and Machakos ELC 077 of 2021 be consolidated for hearing and final determination. I direct that the consolidated matters be fixed for pre trial directions.

Costs will be in the cause

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE