



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E393 OF 2021**

**MARIANNE JEBET KITANY..... PLAINTIFF**

**=VERSUS=**

**FRANKLIN MITHIKA LINTURI .....DEFENDANT**

**AND**

**ATTICON LIMITED.....INTERESTED PARTY**

**RULING**

***(In respect to the Preliminary Objection dated 24<sup>th</sup> November 2021)***

**Introduction**

1. By a Plaintiff dated 16<sup>th</sup> November 2021, the Plaintiff brought this suit against the Defendant for prayers that;

- a) A declaration that the Defendant holds the title of all property comprising of Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703) in trust for the Plaintiff and the interested party.***
- b) An order of permanent injunction be and is hereby issued restraining the Defendant from disposing, selling, alienating, occupying or in any way dealing with all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703)***
- c) An order of permanent injunction be and is hereby issued restraining the Defendant from evicting, removing or in any other way interfering with the Applicant's occupation of all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703)***
- d) That trust be and is hereby dissolved and an order is made that the property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703) be transferred from the name of Franklin Mithika Linturi into the name of Marianne Jebet Kitany Atticon Limited as tenants in common of undivided shares in proportion of their respective contributions.***
- e) An order be and is hereby issued directing Franklin Mithika Linturi to within Fourteen (14) days from the date of judgment, execute the transfer of L.R No. 7785/1324 (I.R 123703)***
- f) In the event that the Defendant declines to transfer the suit property as directed, the Deputy Registrar of the Environment and Land Court, Milimani Law Courts be and is hereby ordered to sign the transfer duly presented by the Plaintiff for the said purposes.***
- g) Costs of this suit.***
- h) Any other relief that the Honourable Court may deem just and fit to grant in the circumstances.***

2. The Plaintiff also filed an application dated 17<sup>th</sup> November 2021 where she had sought the following orders: -

a) Spent..

b) *That pending the hearing and determination of the application inter parties, the Honourable Court be pleased to issue an order maintaining the status quo obtaining prior to the institution of the suit and, particularly, restraining the Respondent, from evicting, removing, or in any other way interfering with the Applicant's occupation of all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).*

c) *That pending the hearing and determination of the suit herein, the Honourable Court be pleased to issue an order maintaining the status quo obtaining prior to the institution of the suit and, particularly, restraining the Respondent, from evicting, removing, or in any other way interfering with the Applicant's occupation of all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).*

d) *That pending the hearing and determination of the Application inter parties, the Honourable Court be pleased to issue an order of interim injunction restraining the Respondent from disposing, selling and alienating, occupying or in any way dealing with all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).*

e) *That pending the hearing and determination of the suit herein, the Honourable Court be pleased to issue an order of interim injunction restraining the Respondent from disposing, selling and alienating, occupying or in any way dealing with all that property comprising Mae Ridge County Villas No. 16 erected on L.R No. 7785/1324 (I.R 123703).*

f) *That costs of this Application be provided for.*

3. In response, the Defendant and the Interested party through **M/S Muthomi & Karanja Advocates** filed a Replying Affidavit sworn by the Defendant on 17<sup>th</sup> November 2021 and subsequently a Notice of Preliminary objection dated 26<sup>th</sup> November 2021. The gist of the Defendant and Interested Party's replying affidavit and the preliminary objection was that the suit and the application herein was *sub judice*

4. Pursuant to the directions of this Court issued on 2<sup>nd</sup> December 2021, the Court directed the preliminary objection be canvassed through written submissions. The Plaintiff filed her written submissions dated 9<sup>th</sup> December 2021, while the Counsel for the Defendant and Interested party opted not to file but urged the Court to rely on the preliminary objection as it was and the replying affidavit on record.

#### **Objector/Defendant's and Interested party's case**

5. The Defendant and Interested party's preliminary objection delimited some five grounds focusing on the suit and the application. **This included the following: -**

i) *The suit and the Application are sub judice the following pre-existing suits between the same parties and or their privies: -*

a) *Milimani HCCC No. 71 of 2018 (OS) [Previously Meru HCCC No. 37 of 2018]: Maryanne Jebet Kitany v Franklin Mithika Linturi.*

b) *Milimani HCCC No. E201 of 2021 (as consolidated with Milimani HCCC No. 138 of 2018 and E029 of 2019 Arnold Kipkirui Langat & Others v Atticon Limited & Others)*

c) *Milimani HCCC (Misc) No. 031 of 2021: Franklin Mithika Linturi v Maryanne Jebet Kitany and*

d) *Milimani CMCC No. 1044 of 2018; Maryanne Jebet Kitany v Franklin Mithika Linturi.*

ii) *Various courts and tribunals have already granted the plaintiff interlocutory reliefs that are analogous to those sought in the Application in inter alia the suit alluded to above.*

iii) *The Plaintiff has deliberately refused to comply with the terms and conditions of existing interlocutory orders, relevant to the reliefs sought in the Application, issued by Hon. Agnes Ndunge Makau in Milimani CMCC No. 1044 of 2018; Maryanne Jebet Kitany v Franklin Mithika Linturi on 2<sup>nd</sup> June 2021.*

iv) *The suit and the Application;*

a) *offend the provisions of Section 6 of the Civil Procedure Act; and*

b) *are scandalous, frivolous and vexatious.*

v) *The reliefs sought in the suit and the Application cannot be granted without adversely affecting the rights and interests of the third parties in the suit property, including; the Defendant's wife Mercy Kaimenyi, the Defendant's children, and the chargee Family Bank Limited.*

6. The Replying affidavit expounded and reiterated on the contents of the Notice of the Preliminary Objection, it was deposed that various courts and tribunals have already granted the Plaintiff the Interlocutory reliefs analogous to those sought in the application and that they relate to the suit property. The Defendant also annexed the pleadings and or decisions made by various courts relating to the suit property.

7. It was further deposed that the Plaintiff had come to Court with unclean hands as she had deliberately failed to comply with the terms and conditions imposed by the Court (Hon. Agnes Makau) wherein she had failed, refused and neglected to settle and clear all pending land rates, utility bills during her occupation on the suit property.

8. The Defendant also deposed that, the reliefs sought in the application and the suit cannot be granted without adversely affecting the rights and interests on the suit property including the Defendants wife, Mercy Kaimenyi,

9. In support of this position, the Defendant maintained that the instant suit was *sub judice* pursuant to the provisions of **section 6 of the Civil Procedure Act** and that the suit and the application were only filed to prolong the existence of interlocutory orders that the Plaintiff has been enjoying from the other existing suits.

#### **Applicant/Plaintiff's submissions**

10. The Plaintiff opposed the preliminary objection. She contended that the suit was properly before this Court and that the same was not *sub judice*.

11. It was her contention that the dispute before this court was in respect to ownership of the suit property which is not subject to deliberation or pending before any court of competent jurisdiction.

12. The Plaintiff further submitted that she had raised the issue of the resulting trust which had not been litigated before between the parties herein.

13. According to the Plaintiff, various suits that were listed by the Defendant and the Interested Party do not deal with the current subject matter at hand and that in some of them, the Plaintiff is not a party hence *sub judice* was not applicable herein.

14. In opposition to the objection, reference was made to a number of cited authorities which included the following; **Kenya National Commission on Human Rights v Attorney General, IEBC & 16 Others [2020] eKLR, ANN v RMK [2021] eKLR, Edward Akong'o Oyugi & 2 Others v Attorney General [2019] eKLR**, among others.

15. She concluded her submissions by urging the Court to dismiss the preliminary objection with costs and allow the matter to proceed before to its logical conclusion.

#### **Analysis and Determination**

16. I have considered the preliminary objection and the written submissions filed by the Plaintiff and the authorities cited. The issue for determination is whether the preliminary objection is merited.

17. The case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** has been the watershed as to what constitutes preliminary objections. The Court of Appeal in **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** also pellucidly captured the legal principle when it stated as follows:

***“...A Preliminary Objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion...”***

18. This statement of the law has been echoed time and again by the courts: see for example, **Oraro –v- Mbaja [2007] KLR 141**.

19. In **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** the Supreme Court stated 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”***. [emphasis added]

20. The *sub judice* principle is captured in **Section 6 of the Civil Procedure Act**, which stipulates as follows: -

***“6. 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.”***

21. In this regard, **section 6 of the Civil Procedure Act** 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 basic purpose and the underlying objective of *sub judice* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

23. The Supreme Court of Kenya in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR**, had occasion to pronounce itself on the subject of *sub judice*. It aptly stated: -

*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”.*

24. In the case of **David Ndi & others versus Attorney General & Others 2021 eKLR**, a bench of five Judges inter alia stated;

*“The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”*

25. The Plaintiff did not disclose in her pleadings the existence of the earlier suits and It is common ground that the instant suit was filed despite the existence of pending suits; **Milimani HCCC No. 71 of 2018 (OS) [Previously Meru HCCC No. 37 of 2018]: Maryanne Jebet Kitany v Franklin Mithika Linturi, Milimani, HCCC No. E201 of 2021 (as consolidated with Milimani HCCC No. 138 of 2018 and E029 of 2019 Arnold Kipkirui Langat & Others v Atticon Limited & Others), Milimani HCCC (Misc) No. 031 of 2021: Franklin Mithika Linturi v Maryanne Jebet Kitany and Milimani CMCC No. 1044 of 2018; Maryanne Jebet Kitany v Franklin Mithika Linturi**. I have had the occasion to peruse the ruling and or temporary orders issued in **Milimani HCCC No. 71 of 2018 (OS) Maryanne Jebet Kitany v Franklin Mithika Linturi and Maryanne Jebet Kitany v Franklin Mithika Linturi and Milimani CMCC No. 1044 of 2018** that are still pending before various courts.

26. In **Milimani HCCC No. 71 of 2018 (OS) Maryanne Jebet Kitany v Franklin Mithika Linturi**, the Applicant sought to restrain eviction and an urgent temporary injunction from wasting, damaging or alienating and/or otherwise interfering with several matrimonial properties including the suit property. The Applicant claimed that during the subsistence of their marriage, she made both direct and indirect contribution towards the acquisition of various properties listed in the summons as well as the formation of various companies. She contended that the properties were held by the respondent in trust for her and that of his benefit. The Court after hearing the parties, granted the Applicant various interim reliefs including orders that the Applicant returns to the suit premises, pending the hearing and determination of that suit.

27. In the case of **Maryanne Jebet Kitany v Franklin Mithika Linturi [Milimani CMCC No. 1044 of 2018]**, the Court on 1<sup>st</sup> February 2019, issued several orders with regard to **Mae Ridge Country Villa No 16.erected on LR No. 7785/1324 (I.R 123703) (suit property)**. The orders that were issued, granted the Applicant exclusive occupation of the shared residence and use of the facilities therewith by excluding the Respondent from the suit property. The said order was to remain in force pending the determination of **Divorce Cause No 26 of 2018[CMCC Meru]** and **Milimani HCCC No. 71 of 2018 (O. S.) [MJK v FML]**.

28. Having keenly perused all the cases referred herein, the court finds that there is a nexus in that all those cases relate to **Mae Ridge Country Villa No 16 erected on LR No. 7785/1324 (I.R 123703) (suit property)** and they involve the Plaintiff and the Defendant herein, some of those cases already have interlocutory orders in favour of the Plaintiff.

29. The Applicant while objecting to the suit being sub judice, submitted that the doctrine of sub judice is too remote to be applied in the instant suit since the instant suit challenges ownership of the suit property and had raised the issue of resulting trust which had not been litigated by the parties nor pending before any court of competent jurisdiction. I am not persuaded with this position as submitted by the Plaintiff since **Milimani HCCC No. 71 of 2018 (OS) Maryanne Jebet Kitany v Franklin Mithika Linturi**, currently pending for determination shows that the Plaintiff pleaded the issue of trust which has also been pleaded and is among the prayers sought as demonstrated by the plaint filed herein.

30. In my view, whichever way we may wish to look at the issues herein, there is a high probability that the issues touching on the instant suit and the other pending suits in respect to the suit property may affect the future dealings of the said property. This Court must therefore be aware of such a possibility and be alive to the fact that proceeding with this suit may lead to different courts granting conflicting orders over the same subject property. The Plaintiff ought to await the outcome of the other pending suits before moving this court.

31. In conclusion, I find merit in the preliminary objection and the same is upheld. Consequently, the interim orders issued on 18<sup>th</sup> November 2021 are hereby discharged. The Notice of Motion dated 17<sup>th</sup> November 2021, the Plaint dated 16<sup>th</sup> November 2021 and the entire proceedings are hereby struck out with no orders as to costs.

32. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2022.**

**E. K. WABWOTO**

**JUDGE**

In the Virtual Presence of:-

Mr. Kibet h/b for Mr. Kurgat for the Plaintiff.

Ms. Jeruto h/b for Dr. Muthomi for the Defendant and Interested Party

Court Assistant: Caroline Nafuna.

**E. K. WABWOTO**

**JUDGE**