REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E050 OF 2020

REGINA GATHONI.....APPELLANT

VERSUS

SAMUEL WAINAINA GITHACURI.....RESPONDENT

(From the ruling of Hon. G. Onsarigo SRM dated 17/10/2020 in KIKUYU SRM (EL) CASE NO. 25 OF 2020)

JUDGEMENT

1. Vide a Memorandum of Appeal dated 16/11/2020, the Appellant appeals to this court challenging the Ruling that issued the interlocutory orders dated 17/10/2020 in **KIKUYU SRM (EL) CASE NO. 25 OF 2020** wherein the court dismissed an application for stay of execution pending appeal.

2. Together with the Appeal the Applicant filed a Notice of Motion dated 16/11/2020 for enlargement of time. The orders sought in the said application were granted and the Applicant was allowed to file and serve her appeal within 30 days of the delivery of the order on 9/08/2021.

3. The appellants being dissatisfied with the ruling of the learned trial magistrate (Hon. G. Onsarigo) dated 17/10/2020 filed the said appeal on the following grounds:-

1. The learned Senior Principal Magistrate erred gravely both in fact and in law when he failed to make a finding whether there was indeed serious concealment of material facts by the respondent when seeking interlocutory orders.

2. That the learned Senior Principal Magistrate erred gravely when he failed to address the issue whether the Appellant has any locus standi to be a party in the suit despite the fact that it was pointed out in the Appellants replying Affidavit and statement of defence that there was already another case pending before the same court filed by the Respondent against the now deceased mother of the Appellant based on some grounds as the present one.

3. The trial court erred gravely when it failed to consider that the appellant cannot comply with the injunction orders issued because they are beyond her power to do so, being neither a landowner in the neighbourhood of the Respondent, nor his residential neighbour, or the administrator of her deceased parents' estate.

4. That the trial court has therefore exposed the Appellant to possible imprisonment for being unable to comply with the orders.

5. That the appellant has been placed into an impossible situation by the orders which are oppressive and beyond the appellant's ability to comply with the said orders.

6. The lower court having failed to make a finding on the issues raised by the appellant arrived at the wrong conclusion by granting the orders.

REASONS WHEREFORE the Appellant prays that:

(i) The ruling and orders given against the Appellant on 30/072020 in KIKUYU SPMCC MCL & E NO. 25 OF 2020 be set aside.

(ii) The trial court to first decide whether the Appellant is properly a party in that case, and if necessary legal grounds have been laid to sue her alone out of eight siblings.

4. On the 18/11/2021 the court with the consent of the parties directed that the appeal be canvassed by way of written submissions.

The Appellants' Submissions

5. They are dated 15/12/ 2021. They raise four grounds for consideration:-

i. The learned Senior Resident Magistrate failed to make a finding whether or not the Respondent concealed material facts in the motion dated 22nd May,2020.

ii. The learned Magistrate failed to address/or make a finding whether the Applicant had locus standi to be a party to the suit.

iii. The learned Magistrate failed to consider whether Applicant could possibly comply with court orders.

iv. The learned Magistrate exposed the Applicant to penal consequences for failing to comply with orders which she has no capacity to comply with.

6. The Appellant avers that the there is no dispute that the Respondent did not disclose the fact there was already another suit filed concerning the same property against the Appellant's mother in **SPMCC No. 294 of 2016** and praying for same orders as those in **SPMCC MCL & E No. 25 of 2020.** Further that whereas this was raised in the Appellants pleadings, the learned Magistrate did not address this matter. She contends that the learned magistrate addressed the issue that it would have touched on the jurisdiction of the court.

7. She further avers that the mother died but she was sued instead in the **SPMCC MCL & E No. 25 of 2020** yet she is neither an administratrix of the mother's estate nor was there a legal process that was produced before the court to show that she had been substituted in the matter following the death of her mother. She contends that she therefore lacked locus to participate in the suit nor to be sued in relation to the suit property Karai/Karai/1387 since she was neither the owner nor did she own any property next to the one of the Respondent.

8. She relied on the cases of ***Abraham Mutai & 5 others -vs- Paul M. Mutwii & 34 others [2015]eKLR*** where the Honourable Justice Sergon quoted the principles involving concealment of material facts in ex parte Application as set out in the ***Court of Appeal Civil Appeal No. 210 of 1997 Bahadurali Ebrahim Shanji -vs-Al Noor Jamal & 20 others (Authority enclosed).***

9. She asks the court to set aside the orders made by the learned magistrate against her.

The Respondent's Submissions

10. They are dated 17/01/2022. The Respondent contend that the application before the trial court was the Respondent's Notice of Motion Application filed on 22/05/2020 that the appellant never presented an application on the issue of locus and or the suit being *sub judice*. Therefore, the appeal is an abuse of the court process since the appellant participated in the entire court process.

11. He avers that the appellant has not adduced evidence to show that the temporary orders issued against her and the 2nd defendant were erroneous. He further contends that the issue of *sub judice* is a point of law which touches on the jurisdiction of the court and therefore needed to have been raised and resolved earlier and since the appellant participated in the hearing of the application, she needed to ensure that matters of *subjudice and locus standi* were ventilated and determined first and that to date there is no such application that has been filed. The respondent stated that the appeal is frivolous and an abuse of the court process. He relied on the case of ***Samek Takwenyi & Another vs David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009*** where it was held that the it is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.

Analysis and Determination

12. Having considered the pleadings in the lower Court, the rival affidavits, the record of Appeal and the submissions the key issues that fall for determination are;

a) Whether the lower Court had jurisdiction to determine the application;

b) Whether the SPMCC MCL & E No. 25 of 2020 was subjudice in view of SPMCC No. 294 of 2016;

c) What orders should the Court give; who meets the costs of the Appeal.

Whether the lower Court had jurisdiction to determine the application

13. Now, the duty of the ELC on Appeal is to first to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. See the case of ***Abok James Odera & Associates v John Patrick Machira t/a Machira& Co. Advocates [2013] eKLR***. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice. See ***Coffee Board of Kenya Vs Thika Coffee Mills Limited & 2 Others [2014]eKLR.***

14. In respect to whether the Court was clothed with jurisdiction to hear the suit **SPMCC MCL & E No. 25 of 2020** and subsequently the

15. Section 7 of the Civil Procedure Act is a bar to a Court proceeding with issues that had been legally rested by Courts of competent jurisdiction. It states as follows;

> ***"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."***

16. The Respondent was well aware that he had instituted ***SPMCC No. 294 of 2016*** which had not been determined and was pending before court. This matter he did not disclose in his pleadings though it was disclosed by the Appellant/Defendant whose mother Medrine Wambui is a defendant in the said suit. At paragraph 9 of the Replying Affidavit of the Appellant/Defendant, dated 2/06/2020 she states and discloses that there is existence of a suit that was filed by the Respondent/Plaintiff which was filed on 19/10/2016 in Kikuyu court which remains active. It refers to the same subject matter and the parties are the same and prayers sought are the same. She also annexed a copy of the plaint to the documents she filed in court in the ***SPMCC MCL & E No. 25 of 2020*****.** The court was therefore made aware that there was another suit. This knowledge does challenge the jurisdiction of the court in continuing to hear the matter and therefore strip the court of its jurisdiction over the matter.

17. It therefore follows that since the learned magistrate was alerted about the earlier suit filed in the same ELC court in Kikuyu he should have stayed the latter suit and allowed the earlier suit to be prosecuted to the end.

18. In conclusion the Hon Learned Magistrate fell in error when he wrongly assumed jurisdiction in a matter already in another court of similar jurisdiction. In the locus classicus on jurisdiction is the celebrated case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** where Justice Nyarangi of the Court of Appeal held as follows;

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

19. The meaning of jurisdiction is expounded in the writings of ***John Beecroft Saunders in a treatise which is no longer published headed Words and Phrases Legally defined – Volume 3: I – N and it states at page 113*** the following about jurisdiction:-

> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

20. In the case of ***In MACFOY VS UNITED AFRICA LTD (1961) 3 All F.R. 1169*** Lord Denning said at p. 1172:

> ***"If an Act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the Court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

21. From the foregoing therefore I find that the learned magistrate did not have jurisdiction to entertain the suit.

22. The second bar in jurisdiction that barred the trial Court from entertaining the suit and application emanates from the provisions of Section 34 of the Civil Procedure Act which states as follows;

> ***"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."***

23. In the case of ***James Wainaina Imunyo& 6 Others v Karanja Mbugua& Co. Advocates & Another [2012] eKLR*** the Court set out the procedure as;

> ***"..... if the Plaintiff wishes to contest the execution process in that suit, then the only avenue open is to challenge that process in the same suit, and not by filing a fresh suit. I need not belabour the point, Section 34 speaks for itself."***

24. My reading of Section 34 as applied to the current case is that the Respondent/Plaintiff has taken the matter through a detour and misadventure for the sole purpose of seeking an interim injunction. Section 34 redirects him back to the original suit **SPMCC No. 294 of 2016** to seek the relief there and not file a fresh suit.

25. As to whether the Respondent proceeded in mischief and abuse of Court process when he filed a fresh suit before the same Court **,** this issue may inevitably be answered in the positive. The pleadings confirm that the Respondent had moved the Magistrate's Court seeking the same orders. The same Respondent filed a different suit and knowing that the defendant in the earlier suit was deceased he enjoined the daughter and proceeded as though it is a fresh matter. Indeed the 2nd defendant was not in the first suit but the suit property is the same and the prayers are a replica. A better way would have been to seek leave of court to enjoin the second defendant and substitute the 1st defendant who is deceased.

26. From the foregoing cases and decisions, it follows that filing a different suit against the same parties is an abuse of Court process and misuse of minimal judicial resources costs and time. Such action is aimed at vexing the adverse party and in the long run cause prejudice due to relitigating the same issues and exposing the adversary to unnecessary costs of litigation. It is also a fertile ground upon which the authority and dignity of the Hon Court can be eroded and the Court as the temple of justice is brought into disrepute particularly through different hierarchical decisions that may be an embarrassment to the Courts, to say the least.

Whether the SPMCC MCL & E No. 25 of 2020 was sub judice in view of SPMCC No. 294 of 2016;

27. Whether SPMCC MCL & E No. 25 of 2020 was subjudice. The Respondent in this matter filed by way of Plaint ***SPMCC No. 294 of 2016*** and he also instituted ***SPMCC MCL & E No. 25 of 2020*** where the suit property was the same and the prayers sought were the same and the parties were the same save that in the later suit the Defendant was the daughter of the deceased defendant in ***SPMCC No. 294 of 2016***. The Respondent while aware of the existence of the earlier suit in 2016 went ahead to institute a new suit in 2020 When two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources and frivolous litigation. In order to correct this redundancy, the doctrine of sub judice which is captured in **section 6 of the Civil Procedure Act** is the remedy that the law has prescribed.

28. Sub judice denotes that a matter is being considered by a court or judge. It therefore bars any other court from trying an issues that is so long as the first suit is still alive. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

29. Section 6 of the Civil Procedure Act provides as hereunder:

> ***"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."***

30. The Supreme Court of Kenya in ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*** 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."

31. There are three essential conditions for bringing in the operation of the doctrine of res *sub judice*. These are as follows: -

> ***(1) The matter in issue in the subsequent suit is directly and substantially in issue in the previously instituted suit, (2) The parties in the both suits are the same, either directly or indirectly and, (3) The court in which the first suit is instituted, is a court of having jurisdiction or competent to grant the relief claimed in the subsequently instituted suit.***

32. The rationale for this principle was restated in Kampala High Court ***Nyanza Garage vs. Attorney General Civil Suit No. 450 Of 1993*** **-**in which the Court held that***:***

> "In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

33. In ***Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012]eKLR*** the court held that:

> "**…**if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding

objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties..."

34. Similarly, in ***Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR***; the Court opined that:

> ***"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 pleading in both cases."***

35. In determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. Looking at the plaint that was filed on 19/10/2006 and the Notice of Motion application dated 22/05/2020. The substance of this suit is wholly identical to the earlier suit.

Who shall bear costs of the application

36. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See ***Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287*.** The court finds no good reason why the successful litigant should not be awarded costs of the appeal. Accordingly, the Appellant shall be awarded costs of the appeal.

CONCLUSION AND DISPOSAL

37. The long and short of this is that the Appeal is merited and allowed as prayed

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2022.

…….

MOGENI J

JUDGE

In the presence of

Mr. A.N Mugu for the Appellant

Mrs. Kihika for the Respondent

Vincent Owuor Court Assistant