



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. E037 OF 2021

CYRUS MUCEBIU IRUNGU.....PLAINTIFF

VERSES

MARTHA WANJIRU IRUNGU.....1ST DEFENDANT

JIANGXI TRANSPORT ENGINEERING

GROUP LTD.....2ND DEFENDANT

RULING ON A PRELIMINARY OBJECTION

By a Notice of Preliminary Objection dated 21st October 2021, the 1st Defendant raised the following three grounds of objection:-

- 1) That the issues canvassed in support of the said application are *sub judice* under Section 6 of Civil Procedure Act as the issue of the 1st defendant's proprietary rights over the suit and the 1st defendant herein in KERUGOYA ELC NO. 31 OF 2021 which is currently pending before this Honourable Court.
- 2) That there is a pending petition before the High Court at Milimani, Family division being HCF CC E023 OF 2021 IN THE MATTER OF CYRUS MUCEBIU IRUNGU. The petition seeks to ascertain the mental capacity of the plaintiff herein. The same is pending determination and comes up for hearing on 27th January, 2022.
- 3) That the Application and suit herein is frivolous, vexatious and an abuse of the Court process and should be dismissed with costs in limine.

When this matter came up for directions on 10/11/2021, the parties agreed to canvass the said preliminary objection by way of written submissions. Pursuant those directions given by the Court, the 1st defendant through the firm of M/S KIMITI & ASSOCIATES, ADVOCATES filed their submission dated 24/11/2021 on 10/03/22 while the plaintiff through the firm of M/S HASSAN MUTEMBEI & COMPANY ADVOCATES filed theirs dated 26th November, 2021 the same date. The firm of M/S IRUNGU KANGATA & COMPANY ADVOCATES instructed by 2nd defendant had not filed their submissions by the time the court withdrew to write this ruling.

1ST DEFENDANTS WRITTEN SUBMISSIONS

The 1st defendant submitted that the instant suit and the application are *sub judice*, as the matters canvassed in the suit herein are pending for determination in another suit namely **Kerugoya ELC Case No. EO31 of 2021**. The 1st defendant further submitted that the parties in both suits and in the application herein are identical, and the subject matter of this suit and the instant application (being the property known as **KIINE/RUKANGA/1689**) is the same as that in **Kerugoya ELC 31 of 2021**.

It is the 1st defendant's further submission that the above cited matter, **Kerugoya ELC 31 OF 2021**, was filed before the matter herein and therefore the matter now before me is *sub judice* **Kerugoya ELC 31 OF 2021**. The 1st defendant cited the followings cases in support of the Preliminary Objection; **Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) (2020) e KLR, Independent Boundaries Commission Vs Jane Cheperenger & 2 Others (2015) e KLR, John Patrick Muchira Vs Patrick Kahiaru Muturi (2002) e KLR and Stephen Mbugua Ikigu Vs Peter M. Mbugua & 2 Others (2014)**.

PLAINTIFF'S WRITTEN SUBMISSIONS

The plaintiff through the firm of M/S HASSAN MUTEMBEI & COMPANY ADVOCATES submitted that what has been raised by the 1st

defendant is not a preliminary objection properly called as the same does not meet the litmus test to what amounts to a Preliminary Objection. He referred to a number of decisions where Preliminary Objection was discussed including the following; **Quick Enterprise Ltd-v- Kenya Railways Corporation, Kisumu HCCC NO. 22 of 1999 (U/R), Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC NO. 53 OF 2004 (U/R), Oraro Vs Mbaja (2005) 1 KLR 141 and Margaret Wachu Karuri Vs John Waweru Ribiro (2021) e KLR.**

As to whether the instant suit is *sub judice*, the plaintiff submitted that the parties in **Kerugoya ELC E031 of 2021** are different from the ones in the instant application herein. Further, he submitted that the issues and orders sought in the current application and suit differ substantially from the issues and orders sought in **KERUGOYA ELC EO31/2021** while the parties in **HCFCC EO23/2021** and the orders sought are also substantially different. He cited the following case in support; **Kampala High Court Civil Suit No. 450 of 1993 - Nyanza Garage Vs Attorney General.**

LEGAL ANALYSIS AND DECISION

I have considered the Notice of Preliminary Objection by the 1st defendant and the rival submissions. The doctrine of *sub judice* is founded under **Section 6 of the Civil Procedure Act, CAP. 21** which provides 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, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”.

Numerous decisions have put the issue in perspective. In the case of **Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) e KLR**, the Supreme Court of Kenya held;

“The purpose of 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-----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 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”.

The plaintiff in this suit avers that he is the registered proprietor of the suit land parcel No. KIINE/RUKANGA/1689 which he purchased with vacant possession and which title he has held and which land he is entitled to exclusive possession. In his affidavit in support of the application herein, the Applicant has annexed a copy of title and marked **“CMI-1”**. The plaintiff/Applicant further stated that on unknown dates to him and without his consent, authority and/or knowledge, the 1st defendant/respondent herein who is known to him by virtue of cohabitation with her and the mother of his two children, entered into an agreement with the 2nd defendant/respondent and allowed the 2nd defendant/respondent to enter into and start to excavate, dig, and mine Murram from property known as KIINE/RUKANGA/1689, which invasion and ingress on his property by the 1st and 2nd defendants/Respondents is tantamount to trespass and a violation of his proprietary rights under the constitution. Copies of photographs of the alleged excavation works are annexed and marked **“CM-3a-3c”**.

The 1st defendant on the other hand alleged that there are two other suit filed earlier than the present suit between the same parties and the subject matter identical. However, copies of pleadings in the other two cases have not been supplied in order for this Honourable Court to interrogate the same to determine whether this suit is *sub-judice*. I agree with the submission by counsel for the plaintiff that the issue of *sub-judice* does require the ascertaining of facts or probing of evidence in the two earlier suits mentioned by the 1st defendant which this honourable court is not privy to. It therefore follows that the issue of *sub-judice* is not a pure point of law capable of being considered as a preliminary objection properly raised and does not meet the litmus test of what in law amounts to a preliminary objection.

In the case of **MARGARET WACHU KARURI Vs JOHN WAWERU RIBIRO (2021) e K.L.R**, the Court was faced with a similar question whether *sub-judice* can be raised as a preliminary point and held as follows;

*“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is *sub-judice*, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.*

Consequently, the court finds and holds that the notice of preliminary objection dated 30th August, 2019, by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/Respondent”.

I agree entirely with the reasoning in the above decision which is in all fours with the instant case. As such, I find and hold that the Notice of Preliminary Objection dated 21st October, 2021, by the 1st defendant/objector is not merited and the same is hereby dismissed with costs to the plaintiff. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 11TH DAY OF MARCH, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Kimiti for the 1st Respondent
2. Ms Mungai holding brief for Irungu Kangata for 2nd Defendant
3. Plaintiff/Advocate – absent
4. Kabuta, Court clerk – present.