



REPUBLIC OF KENYA



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**Menza & 2 others v Koi & 2 others (Environment and Land Case Civil
Suit 159 of 2018) [2022] KEELC 3710 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 159 OF 2018**

MAO ODENY, J

MAY 11, 2022

BETWEEN

RAPHAEL MENZA 1ST PLAINTIFF

LENNOX M NGALA 2ND PLAINTIFF

**JEREMIAH C KITHI [SUING ON BEHALF OF MIBUYU SABA
2ND, 3RD ROWS & ADJACENT AREA SQUATTER FORMALIZATION
SCHEME] 3RD PLAINTIFF**

AND

KATANA KABUGU MENZA 1ST DEFENDANT

ANTONY KAHINDI KOI 2ND DEFENDANT

JONATHAN NYUNDO 3RD DEFENDANT

JUDGMENT

1. By a plaint dated July 16, 2018 the plaintiffs herein sued the defendants jointly and severally seeking the following orders:
 - a. A declaration that the plaintiffs have a right to deal with the parcels of land in their area of jurisdiction namely land in Mibuyu Saba 2nd, 3rd rows and adjacent areas Squatter Formalization Scheme.
 - b. A permanent injunction against the defendants and their agents or employees or hirelings or legal representatives from occupying, possessing, using, transferring or having any dealings with the parcels of land in the plaintiffs area of jurisdiction land in Mibuyu Saba 2nd, 3rd rows and adjacent areas Squatter Formalization Scheme.
 - c. Costs of and any incidental to this suit.



2. The plaintiffs' case was that at all material times, they were the officials of Mibuyu Saba 2nd, 3rd rows and adjacent areas Squatter Formalization Scheme in Kilifi (also the suit property), a duly registered community based organization. That the defendants have since trespassed on the suit property by purporting to sign transfers of plots within the suit property in the name of being officials of a self-help group – Mibuyu Saba Residential Self Help Group, which according to the plaintiffs is not registered.
3. PW1 Raphael Ngumbao Menza adopted his statement dated July 16, 2018 and produced exhibits and stated that the defendants' group was non-existent as seen in a letter from the Ministry of Labour dated October 3, 2013. He further stated that the disputes in Kilifi PMCC 170 of 2009 and in ELC no 247 of 2016 did not relate to the dispute herein.
4. On cross examination by Mr Shujaa counsel for the defendants, PW1 told the court that he was elected chairman in 2004 when the group was registered as Mibuyu Saba Residential Self- Help Group. He admitted that he had been sued by the 3rd defendant in PMCC 170 of 2009 for lack of authority to deal with the suit land and further stated that the dispute in ELC 247 of 2016 was similar to their prayer 'a' herein, and that both suits were still pending.
5. The defendants filed a statement of defence dated November 8, 2018 and averred that the residents of the suit property area did not recognize the plaintiffs and that the plaintiffs are only imposing on themselves duties meant for the defendants. The defendants contested the jurisdiction of this court by virtue of existence of other suits between the same parties over the same title.
6. DW1 stated that he is the organizing secretary of Mibuyu Saba Residential Self Help Project which is a society formed by the residents of Mibuyu Saba . It was his evidence that the plaintiffs have no jurisdiction over the area and that the residents do not recognize the plaintiffs and do not wish to deal with them.
7. DW1 also stated that there are pending suits in respect of the same parties and the same subject matter being Kilifi PMCC No 170 of 2009 Jonathan Charo Nyndo & 2 others suing as members of Mibuyu Saba Residential Self Help Project Vs Raphael N, Menza & 2 Others and Malindi ELC no 247 of 2016 Raphael N Menza & 2 Others Vs Joseph Katana Charo & 2 others
8. On cross examination, DW1 stated that their group- Mibuyu Saba Self Help Group was registered under the Ministry of Social Services and he confirmed that he did not have the list of beneficiaries. DW1 testified that the plaintiffs changed the name of the group without the consent of the other members.
9. In the submissions counsel largely reiterated the evidence on record. Counsel for the plaintiff urged the court to grant the orders as prayed in the plaint but counsel for the defendants submitted that by virtue of section 6 of the *Civil Procedure Act*, this suit should be dismissed for reasons that the issues raised herein were substantially the same as those in ELC 247 of 2016 and PMCC no 170 of 2009 which are still pending.

Analysis and determination

10. The issue that the court must deal with first is whether this case is *sub judice*. The defendants raised the issue of *sub judice* in their defence and it is pertinent therefore that I address the same. Section 6 of the *Civil Procedure Act* 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.”

11. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* [2020] eKLR Mativo J aptly expounded on the subject of *sub judice* as follows:

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.”

12. From the evidence on record both the plaintiffs stated that there are pending cases in respect of the same issues under litigation in this suit, that is Malindi ELC 247 of 2016 and Kilifi PMCC 170 of 2009.

13. In Kilifi PMCC 170 of 2009, the 3rd defendant herein and two others all identified therein as interim chairman and members of Mibuyu Saba Residential Self Help Group seek an injunction against the 1st plaintiff and other two officials of Mibuyu Saba Residential Self Help from interfering with the use of the plaintiffs’ plots. They also seek audited reports of the group and elections to be held.

14. In Malindi ELC 247 of 2016 filed on September 19, 2016, the plaintiffs herein seek amongst others, orders that a declaration that Mibuyu Saba 2nd and 3rd rows and adjacent Areas Squatter Formalization Scheme have the sole right to deal with the plots within that area. The defendants in that case are the county executive committee member, land, energy, housing, urban, development and physical planning, one Joseph Katana Charo, Rahab William Daniel and Safari Kilumo. According to the plaint in that case, the three defendants were appointed committee officials by the physical planning office to deal with the issue of land in the suit area.

15. The main issue for determination in the present case and in ELC 247 of 2016 is who is entitled to spearhead the allocation of plots in the Mibuyu Saba area. As Mativo J observed above, it matters not the form which the suit is framed but the substance of the suit. The substance in the former suit and the present one is the same.

16. In *Murang’a County Government v Murang’a South Water & Sanitation Co Ltd & another* [2019] eKLR where the court faced with a similar issue at the judgment writing stage like in the present case, declined to determine the issues it found *sub judice* another suit. The court held:

“55. The two suits are still pending. I thus decline the invitation to determine prayers (i), (ii), (iii), (iv), (v) and (ix) sought by the petitioner in the present suit. For the same reason, I shall not delve too deep into the elaborate submissions by the parties on those six areas.”

17. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya (supra)* Mativo J held as :

“Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. A litigant has no right to pursue paripasu two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process



where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process. It matters not that the earlier suit was filed by the Branch of the LSK while the instant suit is filed by the main body”.*

26. I have considered the pleadings and the evidence on record and find that this suit is *sub judice* and an abuse of court process. Parties should not be allowed to clog the court systems in a bid to forum shop. The parties can go back and pursue the other suits which are still pending in the other courts if they so wish. Meanwhile this suit is struck out, being an abuse of court process with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY 2022.

M A ODENY

JUDGE

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

