



**Hussein v Odhiambo & 2 others (Environment & Land Miscellaneous Case E016 of 2021) [2022] KEELC 2597 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND MISCELLANEOUS CASE E016 OF 2021**

**A KANIARU, J**

**JUNE 30, 2022**

**BETWEEN**

**MOHAMED HASSAN HUSSEIN ..... APPLICANT**

**AND**

**FREDRICK AYARO ODHIAMBO ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS MWINGIRWA M'RIMBERE T/A GATEWAY MOTORS  
SPARES ..... 2<sup>ND</sup> RESPONDENT**

**NAKIN GLASS MAKING ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. What is for determination before the court is an amended preliminary objection dated 4.3.2022 and filed on 17.05.2022. The objection targets the application dated 3.11.2021. It is premised on three (3) points as follows:-
  - i) That in the instances (sic), the suit herein offends Section 6 and 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya as the issues raised in the said application are substantially and wholly similar to the issues raised in the applicant's application dated the 29<sup>th</sup> October, 2011 in Embu HCCC No. 61 of 2011 where the applicant and respondents landlord are/were on record over the same subject matter and which issues were substantially and conclusively determined occasioning a ruling by Honourable H.I Ongu'di (J) in Embu HCCC No. 61 of 2011 on 17<sup>th</sup> April, 2013, in favour of Respondents' landlord.
  - ii) That the suit herein as canvassed is frivolous, misconceived, lacks merit and is an obvious attempt to defeat justice by litigating in installments.
  - iii) That it is mete and just that the suit be dismissed.



Reasons Wherefore the respondents prays that the Applicant's application in its entirety be struck out in limine or be dismissed and the Applicant be condemned to bear the costs herein.

2. The matter which is filed as a miscellaneous application is brought by Mohamed Hassan Hussein, who is the applicant herein against Fredrick Ayaro Odhiambo, Francis Mwingirwa M'rimbere T/A Gateway Motors Spares, and Nakin Glass Making, who are the respondents.
3. In the application the applicant sought various orders. First, the respondent is required to deposit with the applicant or his advocate a sum of Kshs. 300,000/= pending determination of the application. Second, the respondents are supposed to vacate the premises failure to which the applicant should evict them from the suit land. Third, the Officer commanding police division and officer commanding Embu police station should provide security and enforce compliance and finally, which is fourth, costs of the application to be borne by the respondents.
4. In the application, the applicant averred to be the registered owner of suit parcel Embu/ Municipality/1220 located in Embu, having purchased the property from one Mary Njeri Mohamed. He further averred to have taken possession of it and established a petroleum station named Ilade Oil on one part and intended to set up a garage and other amenities on the other part. It was his case that the respondents had invaded the property and were carrying out their businesses without his consent and had failed to pay his rent for the premises. It was said that they had further failed to keep the premises in good condition, therefore rendering it a health hazard. He expressed his intention to develop the property, hence the need to have the respondents vacate the premises. It was his further averment that several suits had been filed by one Mohammed Ali Abdalla against Mary Njeri Mohammed and himself to wit; ELC Case No. 538 of 2012, ELC Case No. 57 of 2014, ELC High court Case No. 61 of 2011 and Embu CMCC No. 26 of 2018 but that the other parties to the suit were now deceased.
5. In a response to the application the 1<sup>st</sup> respondent filed a replying affidavit alongside the preliminary objection. In the replying affidavit, he acknowledged being in the property by virtue of one Mohamed Ali Abdalla, who is deceased to whom he states to have been paying rent until his demise. After that he resorted to paying rent to his administrator, Faud Mohamed Ali. He states that prior to his landlord's demise, he was aware of subsisting cases between the applicant and his landlord over the suit property. The suit was therefore said to offend the provisions of Section 6 and 7 of the *Civil Procedure Act* by dint of the existing court cases. It was argued that the present suit was in disregard of those suits and that the applicant had failed to sue the late Mohammed Ali or his administrator. The claim that the suit property had been invaded was termed as untrue and so was the claim that the property was in a deplorable condition.
6. According to the 1<sup>st</sup> respondent, the proprietorship of the property was yet to be established by the courts and evicting him in the circumstance would be untenable considering that he pays rent to the administrator of his late landlord. He argued that he had never received any notice to vacate from the applicant and further that he had invested heavily and the eviction would occasion him substantial loss. To him, the application was frivolous and an abuse of the court process and it ought to be dismissed.
7. The preliminary objection was canvassed by way of written submissions. The respondents filed their submissions on 27.5.2022. Two issues were identified for determination. The first was whether the application offended the provisions of Section 6 of the *Civil Procedure Act*. The respondents relied on the Supreme Court Of Kenya in Kenya National commission on Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 6 others which cited with approval the case of *ANN V RMK* [2021] eKLR that stated the purpose of the rule of sub judice. It was their case that in the supporting affidavit by the applicant, he had stated that there were several matters which touched



- on the same issues as the application before the court. The application was therefore said to offend the provisions of Section 6 of the *Civil Procedure Act*.
8. The second issue was whether the application offended section 7 of the *Civil Procedure Act*. The respondents relied on the case of *Uhuru Highway Development Limited V Central Bank Of Kenya & 2 Others* [1996] eKLR which set out the elements that ought to be met for a suit to be said to be res judicata. It is said that the present application filed before the court was similar to the one filed in Embu High Court Civil suit No. 61 of 2011 (*Mohammed Ali Abdalla vs Hassan Hussein Mohamed*). The application was said to have been heard and determined by the Honourable Justice H.I. Ongudi on 7<sup>th</sup> April, 2013. The respondent relied on the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR which outlined the purpose of the rule of res judicata. It was their contention that instant application was res judicata and that the applicant was attempting to move the court through the backdoor. A prayer was made for the amended notice of preliminary objection to be upheld.
  9. The applicant filed his submissions on 30.5.2022. He identified four issues for determination. The first was whether the amended preliminary objection by the respondents met the basic threshold of a preliminary objection. He sought the highlight of a preliminary objection as spelt out in the case of *Mukisa Bisquit Manufacturing Co. Ltd Vs West End Distributors* (1969) EA 696. The issues raised by the respondents were said to be issues of facts by virtue of their reliance on the list of documents attached to the preliminary objection. For that, the objection was said not to meet the requirements set out in the Mukhisa case and therefore ought to be dismissed.
  10. The second issue was on whether the application offended the provisions of Section 6 of the Civil Procedure Rules. The applicant relied on the case of *Republic v Registrar of Societies – Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR which set out the conditions to be met for a suit to be considered sub judice. It was said there has never been any matter in court between the respondents and the applicants over any matter. Further that the matter in issue has never been determined by a competent court. It was said that the suits referred to, involved different parties from the respondents herein and as such the suit was not sub judice as the element of similar parties was essential to the doctrine of sub judice.
  11. The third issue was whether the application offended the provisions of Section 7 of the Civil procedure Rules. The applicant relied on the case of *Invesco Assurance Company Limited & 2 Others Vs Auctioneering Licencing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested parties)* [2020] eKLR where the court set out the elements to be met for a case to be res judicata. It was submitted that the applicant was the registered owner of the land and parties herein have never litigated between themselves and neither has the matter been determined conclusively.
  12. The last issue he addressed was on whether the application was frivolous, to which he relied on the case of *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR where it was held that a matter is frivolous if it raises no triable issues and is intended to vex the defendant. It was stated that the applicant had laid down his claim that he was the registered owner of the land and the respondents were enjoying the property without paying him rent. He restated his right to seek eviction of the respondents from the property and averred that the application was not frivolous and that the preliminary objection should be dismissed.

### **Analysis and Determination**

13. Having considered the objection raised, the submissions by the parties and the pleadings in general, I find that the only issue for consideration is whether the preliminary objection is meritorious. The



Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors (1969) EA 696 at 700 with regard to what constitutes a preliminary objection aptly 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. The court in the case of *Virginia Wamubu Kamiti & another v Lydiab Nyambura Mahinda & 5 others* [2022] eKLR cited the Supreme Court decision in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR wherein it stated:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

15. From the foregoing, it is apparent that a preliminary objection raises a point of law which if argued has the potential of disposing of the suit. It should not raise disputed fact. If anything, the objection is raised on the presumption that the facts therein are not in dispute. Further, the grounds raised should not seek the court’s discretion or seek to ascertain facts or evidence from elsewhere. The 1<sup>st</sup> respondent has raised three points of objection. I have considered all the points raised. In my view grounds 2 and 3 should not be raised in a preliminary objection as they do not meet the criteria as in the Mukhisa Case (case). Ground 2 seeks for the court to make a finding that the suit is frivolous, misconceived, lacks merit, and is an obvious attempt to defeat justice by litigating in installments. Ground 3 on the other hand states that it is mere and just that the suit be dismissed. These two grounds as raised would require the court to call evidence and examine the facts before it to establish the veracity of the averments in the grounds. They are not points of law and they require to be ascertained through evidence.

16. There is therefore one ground left for determination, which is ground one of the objection. The said ground states that the suit herein offends Section 6 and 7 of the *Civil Procedure Act* (Chapter 21 Laws of Kenya) as the issues raised in the said application are substantially and wholly similar to the issues raised in the applicant’s application dated the 29<sup>th</sup> October, 2011 in Embu HCCC No. 61 of 2011, where the applicant and respondents landlord are/were on record disputing over the same subject matter and which issues were substantially and conclusively determined vide a ruling by Honourable H.I Ongu’di (J) in Embu HCCC No. 61 of 2011 on 17<sup>th</sup> April, 2013, in favour of Respondents’ landlord.

17. I will determine the objection in two parts; the first being whether the objection offends the provisions of Section 6 of the *Civil Procedure Act*. The said section provides as follows 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”.

18. The rule under Section 6 of the Civil Procedure Rules is the concept of subjudice. The said term is defined under the Black’s Law Dictionary 9<sup>th</sup> Edition to mean “Before the Court or Judge for determination”. The purpose of the sub judice rule is to prevent courts of concurrent jurisdiction from handling matters and adjudicating upon two parallel litigations where the cause of action, the subject



matter and relied is similar. It serves 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. See the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR

19. Further, the court in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR cited with authority the Supreme Court of Kenya advisory opinion in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* where the court pronounced itself on the issue of sub judice as follows:

67] 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.

20. For a matter therefore to be said to be sub judice, there ought to be a similarity of suits pending before courts of competent jurisdiction and the suits should be filed by the same parties, over the same subject matter, and seeking the same relief. Is that the case in this matter? According to the respondents, the applicant had made an admission in his supporting affidavit that there were several matters which touched on the same issues as the application before the court, hence rendering the suit subjudice. The applicant’s on his part advanced the argument that there has never been any matter in court between the parties in this suit. The matter before the court was said to have never been determined, and further by dint of it involving different parties, then it cannot be said to be sub judice. The applicant emphasized that the element of similar parties was key in a claim on sub judice.
21. The suits alluded to by the parties as outlined in the supporting affidavit are ELC Case No, 538 of 2012, ELC Case No. 57 of 2014, ELC High court Case No. 61 of 2011 and Embu CMCC No. 26 of 2018. The parties in the four suits are Mohamed Ali Abdala Vs Mary Njeri Mohamed and Mohamed Hassan Hussein. It is worth pointing out that the pleadings in the suits have not been provided for the court’s perusal. However, the specific suit in which the respondents allege to be subjudice to the suit before me, is the case of Mohamed Ali Abdala Vs Mary Njeri Mohamed and Mohamed Hassan Hussein ELC No, 61 of 2011. The defence and counterclaim in that suit have been attached therein. The applicant in that suit sought vacant possession against one Mohamed Ali Abdalla and mesne profits in the sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) monthly for the unlawful occupation of the property. In that suit the plaintiff therein contests the ownership of the defendant.
22. The suit currently before the court is by Mohammed Hassan Hussein against Fredrick Ayaro Odhiambo, Francis Mwingirwa M’rimbere T/A Gateway Motors Spares and Nakin Glass Making. What is sought in that suit is vacant possession of the property and Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) monthly and from the nature of the claim, the said amount can be deduced to be rent for occupation by the respondents on the property as the respondents are said to



have invaded the property and failed to pay rent to the applicant. The applicant says he is the owner of the property.

23. The two suits have been instituted and are against different parties, hence there is no similarity of parties. However there is similarity of subject matter and the cause of action seems similar as the applicant is seeking both in this suit and in his counter claim vacant possession and proceeds for what he terms unlawful occupation. The only difference being that the prayers are sought against different parties. The issue of the parties being different makes the claim on the issue of sub judice to fail. The persons sued in this suit cannot be said to be similar to the plaintiff in ELC 61 of 2011. If anything the parties in that suit are said to be now be deceased save for the applicant herein. However, it has been mentioned that the said plaintiff therein has a legal representative. If this suit had been against such legal representative maybe the determination of the court would have been different.
24. Additionally, the court cannot find the suit to be sub judice as it has been said that the parties in that suit are deceased. We are not informed whether the suit is currently ongoing in court or, whether it has abated by virtue of the plaintiff therein being deceased. We don't know the current status of the suit. It is therefore my considered view that that suit is not sub judice to the suit before me.
25. The second issue is whether the suit is res judicata. The law on res judicata is spelt out in section 7 of the [Civil Procedure Act](#) which states that:
- “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.”
26. The test in determining whether a matter is res judicata was set out in the case of [Bernard Mugo Ndegwa -vs- James Nderitu Gitbae and 2 Others](#) (2010) eKLR, where the court summarized as follows:
- i) The matter in issue is identical in both suits;
  - ii) The parties in the suit are the same;
  - iii) Sameness of the title/claim;
  - iv) Concurrence of jurisdiction; and
  - v) Finality of the previous decision.
27. From the criteria set in the above case, the issues to be considered are similar to the ones to be considered in a case of sub judice, save for the issue on whether there was finality of the previous decision. I have already stated that the parties in ELC Case No. 61 of 2011 are different from the ones in this suit, hence the issue on whether the suit is res judicata also fails. Even assuming I were to consider that last issue concerning finality of the decision, the ruling attached in that suit did not determine the suit to finality. The court in its determination resorted to transferring the suit to Kerugoya, hence the ruling annexed did not in any way support the claim on the suit being res judicata.
28. I therefore make a finding that the preliminary objection raised lacks merit and the same is dismissed with costs to the applicant.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

In the absence of the counsels and the parties.



Court Assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**30.06.2022**

