



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Mburu (Environment & Land Case E007 of 2021)
[2022] KEELC 2761 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E007 OF 2021**

LN GACHERU, J

JUNE 30, 2022

BETWEEN

MILLICENT WANGUI KAMAU PLAINTIFF

AND

LUCY WANJIRU MBURU DEFENDANT

RULING

1. By a Notice of Preliminary Objection dated 17th January 2022, the Defendant/Objector objected to the entire suit on grounds that; the issues canvassed in support of the said application are subjudice, the same having been directly and substantially in issue between, inter alia the same parties herein in Murang'a MCELC NO. 56 of 2020, wherein the suit land forms the substratum of the apparent application and the latter suit.
2. Conversely, the Defendant/Applicant vide a Notice of Motion dated 17th January, 2022 sought for order that;
 - a. This Honourable Court do issue orders dismissing the Originating Summons dated 24th September, 2021, for being subjudice
 - b. Costs of the Application and the Originating Summons be borne by the Plaintiff/Respondent.
3. The application is premised on the ground set out on the face of it and the Supporting Affidavit of Lucy Wanjiru Mburu (the Applicant) sworn on 17th January 2022. It the Applicant's disposition that the issues raised in the Originating Summons herein are pending in Murang'a MCELC Case No. 56 of 2020, in which the Defendant/Applicant has filed a Defence & Counterclaim for specific performance. That the adverse possession claim filed herein is meant to circumvent and defeat the aforementioned suit. That the apparent cause of action available to the Plaintiff/Respondent is in breach of the principle of sjudice as another court of competent jurisdiction has been seized of the matter.



4. Further that the order sought in Murang'a MCELC Case No. 56 of 2020, will be abated should this Court proceed to hear and determine the orders sought in the Application dated 17th January 2022. That the said application is an abuse of the court process and is an attempt to circumvent the civil suit filed. That the Plaintiff is forum shopping, because she has filed a cross suit by way of Counter claim, in which the material facts are the same as herein.
5. The Application is opposed by the Plaintiff/Respondent via a Replying Affidavit sworn on 24th January 2022, and filed in Court on the same day. The Plaintiff/Respondent contends that the instant matter cannot be said to be similar to the one in the lower court in that the issues raised in the two suits are mutually different and cannot be handled by the same Court. That the lower Court lacks jurisdiction to determine issues of adverse possession. That the only plausible way to handle the two matters is to stay the Lower Court Case, pending hearing and determination of this suit.
6. Both the Preliminary Objection and the Notice of Motion Application were canvassed by way of written submissions. The Defendant/Applicant filed her written submissions dated 22nd March 2022, through the Law Firm of Triple N. W& Co Advocates LLP. In her submissions, the Defendant/Applicant reiterated her averments in the Originating Summons and Supporting Affidavit thereto and urged this Court to allow the instant application as prayed.
7. On whether the instant suit is subjudice, the Applicant relied on the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others(Interested parties)*(2020)eKLR, where the Supreme Court defined sub-judice and stated that a party who seeks to invoke the doctrine of subjudice must establish that; there is more than one suit over the same subject matter, that one suit was instituted before another, , that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives. The Applicant submits that the suit had met all the legal imperatives stipulated above. That the instant suit was between the same parties and on the same subject matter as MCELC NO. 56 of 2020. That the two suits also raise the same issues for determination.
8. On the other hand, The Plaintiff/Respondent filed her written submissions dated 5th May, 2022, through the Law Firm of T.M. Njoroge Advocates. The Plaintiff/Respondent in her submissions reiterated her averments in the Replying Affidavit dated 24th January 2022, and urged this Court to dismiss the instant application.
9. The Court has considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds that the main issue for determination is whether the Notice of Preliminary Objection and Notice of Motion Application dated 17th January, 2022 are merited.
10. Before delving into the merit, it is important to lay a background of the suit. The Plaintiff/Respondent filed the instant suit against the Defendant seeking inter alia one acre of land to be excised from LOC. 8/Gaturi/52, having acquired it by way of adverse possession. It is the Plaintiff's claim that she bought one acre of land out of LOC. 8/gaturi/52, in 1976 from Linus Mburu Gitau, and that she has occupied the said land since then. That the said Linus Mburu (now deceased) had given her vacant possession and she had substantially developed the suit land.
11. It is this Originating Summons that the Defendant/Applicant/Objector herein seeks to strike out entirely for being res-subjudice the Murang'a MCELC No. 56 OF 2020. From a perusal of the evidence herein, Murang'a MCELC No. 56 OF 2020, was instituted in Murang'a Chief Magistrates Court by Lucy Wanjiru Mburu, the Defendant/Applicant herein via an amended Plaint dated 2nd October 2020. The Plaintiff therein sought orders against the Defendants inter alia that LOC. 8/Gaturi/52 solely



belongs to the Plaintiff and the Defendants had no proprietary interests in the said parcel of land and an eviction order against them.

12. In her defence the 2nd Defendant filed a statement of Defence and Counterclaim dated 12th October 2020. In the said Counterclaim, the Defendants sought among others for an order directing the Plaintiff to transfer one acre of land out of LOC. 8/Gaturi/52, to the 2nd Defendant.
13. What flows from the pleadings in the instant suit and the pleadings in Murang'a MCELC No. 56 OF 2020 is that both suits revolve around the same subject matter being LOC. 8/GATURI/52. That the Plaintiff in Murang'a MCELC No. 56 OF 2020, is the Defendant in the instant suit, while the 2nd Defendant in Murang'a MCELC No. 56 OF 2020 is the Plaintiff herein. Further that the 1st Defendant and Interested Party in Murang'a in MCELC No. 56 OF 2020, are not parties in the instant suit.
14. Having stated as the above, this Court will move to determine if the Preliminary Objection dated 17th January, 2022 is merited.
15. It is trite that a Preliminary Objection, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.
15. In determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises pure point of law. See the case of *Avtar Singh Bhamra & Another... Vs....Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that:-

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
16. In order to determine whether the rule of sub judice has been offended, this Court has to delve into material facts of the case and the Application, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar. This necessarily puts the matter outside the ambit of a Preliminary Objection. In this respect, the Court concurs with the decision in *Henry Wanyama Khaemba v Standard Chartered Bank LTD & Another* [2014] eKLR, where the court pronounced itself as follows:-

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”
17. Based on the foregoing, this Court finds and holds that the issue of sub judice arising from the instant suit and Murang'a in MCELC No. 56 OF 2020, as stated by the Objector cannot be determined via a Preliminary Objection. The court needs more information than what is currently provided in the Preliminary Objection dated 17th January 2022, to enable it make a proper determination as regards the issue of sub-judice.
18. The upshot of the above is that the issue of sub-judice cannot be determined by way of the Preliminary Objection and as result, the Preliminary Objection date 17th January 2022, is found not merited and the same is dismissed.



19. Having found the Preliminary Objection dated 17th January 2022, is not merited, the second issue for determination is whether the Application dated 17th January 2022, is merited. The Application dated 17th January 2022, is brought under Section 6 of the Civil Procedure Act Cap 21, which 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.”

20. The Supreme Court while discussing the principle of sub judice in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested parties) as cited by the Defendant/Applicant herein held 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.”

21. Basically, for the doctrine of res sub judice to stand in the instant suit, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya. In the instant suit, the Defendant/Applicant avers that the Originating Summons dated 24th September 2021 are subjudice Murang’a in MCELC No. 56 OF 2020 and as a result the said Originating Summons should be dismissed.

22. The orders sought by the Defendant/Applicant herein seek this Court to exercise its discretionary jurisdiction. It is trite that in the exercise of its discretion, this Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in *Patel v E.A Cargo Handling Services Ltd* [1974] EA 75, held that:-

“The main concern of the Court is to do Justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the Rules.”

23. This Court will now move to determine if the instant application has established all the conditions laid out by the Supreme Court as herein above cited. It is evident as has been proven herein that indeed two suits exist being Murang’a MCELC Case 56 of 2020 and Murang’a ELC E007 OF 2021 (OS) and the two suits are yet to be determined.



24. It is also evident that Muranga Loc. 8 /gaturi/52, is the subject matter in both suits. As to whether the parties are similar in both suits, the Plaintiff in Murang'a MCELC Case 56 of 2020 is the Defendant in the instant suit, while the Defendant therein is the Plaintiff in the instant suit. What appears different however are some parties in Murang'a MCELC Case 56 of 2020; more specifically being the 1st Defendant and the Interested Party, are not parties in the summons dated 24th September 2021.
25. The last issue to consider is whether the matter in issue in the suits or proceedings is directly and substantially the same. In Murang'a MCELC Case 56 of 2020, the Plaintiff being the registered owner of Muranga Loc. 8 /gauri/52, inter alia seeks to enforce her proprietary right over the said land and an eviction order and Permanent Injunction against the Defendants, who she alleges had gained and maintained entry on the suit land irregularly.
26. In her Defence, the 2nd Defendant has filed a Defence and Counter claim grounded on purchaser's rights, denying the Plaintiff's allegations and laying a claim for one acre of land to be excised from Muranga Loc. 8 /gaturi/52.
27. In the instant suit however, the Plaintiff seeks adverse possession orders over a portion of one acre to be excised from Muranga Loc. 8 /gaturi/52. It is clear that the issues for determination and orders sought in both suits are different. Further, this Court notes that the ingredients required to establish a case for adverse possession are different in form and substance from the elements necessary to establish proprietary rights and purchasers rights over land.
28. For the above reasons, this Court finds and holds that the instant suit being Murang'a ELC E007 OF 2021 (OS), is not res-subjudice to Murang'a MCELC Case 56 of 2020. That though the two suits are premised on the same suit land, the Parties and issues for determination in both cases are different.
29. The Upshot of the foregoing is that the Court finds and holds that the Notice of Motion Application dated 17th January, 2022 is found not merited and the same is dismissed entirely with costs to the Plaintiff/Respondent.
30. This Court is however not blind to the fact that the outcome in Murang'a MCELC Case 56 of 2020, could affect the outcome on the instant suit and vice versa. For this reason, this Court shall proceed to stay any further hearing or proceedings of the instant suit, pending hearing and determination of Murang'a MCELC Case 56 of 2020 as that suit was filed first.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 30TH DAY OF JUNE, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

T.M. Njoroge for the Plaintiff/Respondent

Mr Ndungu for the Defendant/Objector/Applicant

L. GACHERU

JUDGE

30/6/2022

