



REPUBLIC OF KENYA



**Ogola v Peter (Environment & Land Case 90 of 2021)
[2022] KEELC 3146 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 90 OF 2021**

**MAO ODENY, J
JUNE 10, 2022**

BETWEEN

PAMELA AUMA OGOLA PLAINTIFF

AND

MARY SYEVUTHA PETER DEFENDANT

RULING

1. This ruling is in respect to an application dated November 15, 2021 by the defendant/applicant seeking the following orders; -
 1. That the court be pleased to strike out the suit filed herein vide a plaint dated November 1, 2021 for being scandalous and/or frivolous and/or vexatious and /or prejudicial and/or embarrassing and/or being an otherwise abuse of the court process.
 2. That the costs of the suit and the costs of this application be awarded to the Defendant.
2. Counsel agreed to canvas the application vide written submissions which were duly filed. The application was supported by the affidavit of Mary Syevutha Peter sworn on the November 15, 2021 where she deponed that she filed Malindi ELC Case No. 2 of 2021 (formerly Malindi CMCC ELC Case No. 34 of 2020) where the subject matter among other things was the Defendant's portion on L.R No. 8897 registered under Title No. CR. 25828 where the Plaintiff was the 5th Defendant.
3. It was the applicant's averment that on October 4, 2021, the court granted an order of status quo to be maintained to preserve the substratum of Malindi ELC Case No. 2 of 2021. She also deponed that despite being named a party in Malindi ELC Case No. 2 of 2021 and the subject of the said suit being similar to the suit filed herein, the Plaintiff still filed the current suit.
4. The applicant stated that in June, 2020 another suit, ELC Case No. 39 of 2020 was filed by one Kache Harrison Shutu & 3others against the Plaintiff and the Defendant herein among other persons for



declaration of ownership rights over the suit premises, LR. No. 8897 registered under Title No. CR. 25828. That due to the existence and pendency of Malindi ELC Case No. 2 of 2021, parties moved the court to strike out Malindi ELC Case No. 39 of 2020 and vide a ruling delivered on 16th July, 2021 the court struck out Malindi ELC Case No. 39 of 2020 and directed parties to ventilate their grievances in Malindi ELC Case No. 2 of 2021.

5. In response the plaintiff filed a replying affidavit dated December 16, 2021 where she deponed that the ELC No. 2 of 2021, the original Defendants were Alfred Agunga, Naftali Owino, Harrison Charo Shutu and Francis xavier Ongoro and that she was irregularly and belatedly joined in the matter vide an amended Plaint dated August 22, 2021 filed in court on August 25, 2021.
6. It was her evidence that she was irregularly joined in the matter without the leave of the court and she has not been served with summons to enter appearance further that the limitation period in respect to the suit she filed is almost lapsing and that she could not gamble with filing a counterclaim in ELC No. 2 of 2021.
7. The respondent also deponed that ventilating her claim with a myriad of parties may be a challenge as her case is purely against the defendant/ applicant herein and not anyone else. she however stated that her claim is specific against the defendant only in respect to ¼ acre of land occupied by Prestige Holiday Resort and not any other claim.

Defendant/applicant's Submissions

8. Counsel for the defendant gave a brief background to the case and submitted that the issue for determination is whether this suit is res sub judice and hence should be struck out.
9. It was counsel's submission that this suit is sub judice Malindi ELC Case No. 2 of 2021; Mary Syevutha Peter v. Alfred Agunga, Naftali Owino, Harrison Charo Shutu, Francis Xavier Ongoro, Pamela Auma Ogola, Maitha Mwamure and Registrar of Titles and cited the Supreme Court case in *Kenya National Commission on Human Rights v. The Attorney General & another* [2020] eKLR which set out the principles to be evaluated by the court as follows; -

.....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.”
10. Counsel therefore submitted the reliefs sought by the parties in the two suits revolve around the same subject matter being parcel of land known as Malindi 8897 (CR 25828) also known as prestige holiday resort. Further that Malindi ELC Case No. 2 of 2021 was instituted before the current suit as the same was instituted on June 3, 2020 while the current suit was filed on November 9, 2021.
11. It was counsel's submission that the defendant filed ELC Case No 2 of 2021 (formerly Malindi CMCC ELC Case No 34 of 2020) and sought the following reliefs: -
 - a. A declaration that the plaintiff is the owner of all the portion of land measuring 19.50 by 43.20 metres situated at the junction of Ngala Road and Mombasa Highway on Portion Number 8897- Malindi registered under Title Number CR 25828.
 - b. A declaration that the plaintiff is the owner of all that Portion of Land Measuring 0.12 Hectares adjacent to Kenya Industrial Estates along the Mombasa Highway on Portion Number 8897 Malindi Registered under Title Number CR 25828.



- c. An order compelling the 7th defendant to cancel and remove certificate of title number CR. 25828 in respect of Portion Number 8897 and restore the status quo as at 29th June, 2020.
 - d. An order compelling the 3rd defendant to immediately execute transfer instruments in respect of certificate of title number CR. 25828 in favour of the plaintiff for two portions of land and in default, the said order for transfer do bind the Deputy Registrar who can execute the transfer documents in place of the said 3rd defendant.
 - e. An order of permanent injunction restraining the defendants in person or through their agents, assigns, employees, paid casual laborers, or any other person working under instructions from encroaching, entering, demolishing the perimeter wall, or any part thereof, creating any way inside, erecting any structure, or in any manner interfering with the Portion on LR No. 8897 at the junction of Ngala Road and Mombasa Highway measuring 19.50 by 43.20 meters registered under Title No. CR. 25828 the suit property, The Junction Property and from entering, demolishing the any of the perimeter walls or any part within or around, from pouring any material between the boundaries, or in any manner interfering with the applicant's portion on LR No. 8897 portion measuring 0.12 hectares being a holiday resort known as Prestige Holiday Resort.
 - f. A mandatory order of injunction compelling the defendant to remove the pavings done for the carwash business, the carwash equipment's, encroaching perimeter wall and the gate erected on the western end of the Plaintiff's junction property on portion LR No. 8897 registered under Title No. CR 25828 and to restore the Plaintiff's original perimeter walls to the previous boundary which is about five meters away from where it is now.
12. Mr. Mwanzia also stated that the current suit seeks for reliefs which are in respect of the same subject matter as follows: -
- a. The honourable court be pleased to order the defendant to render vacant possession of part of parcel of land number 8897 Malindi (CR 25828) occupied by herself measuring 0.096 hectares or thereabouts otherwise known as Prestige Holiday Resort.
 - b. The Honourable court be pleased to order the demolition of the developments undertaken on the portion of land occupied by the defendant within the plaintiff's parcel of land known as number Malindi 8897 (CR 25828) otherwise known as Prestige Holiday Resort measuring 0.096 hectares or thereabout.
 - c. The honourable court be pleased to award the plaintiff general damages for trespass as against the defendant.
13. Counsel therefore urged the court to strike out the suit as it is sub judice ELC No. 2 of 2021 which involves the same subject matter in a competent court with jurisdiction hence an abuse of court process. That the Defendant in this suit is the Plaintiff in Malindi ELC Case No. 2 of 2021 (formerly Malindi CMCC ELC Case No. 34 of 2020) while the Plaintiff in the current suit is the 5th Defendant in Malindi ELC Case No. 2 of 2021 (formerly Malindi CMCC ELC Case No. 34 of 2020).
14. Further that the plaintiff has attached a replying affidavit she filed in Malindi ELC Case No. 2 of 2021 wherein she stated, "I am the 5th defendant/respondent herein....". which confirms that the same parties are involved in the two suits.
15. Counsel relied on the case of *Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2others* (2012) eKLR where the court stated 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.

16. Mr. Mwanzia submitted that the issues raised by the plaintiff in this suit will be well ventilated through a counter-claim in Malindi ELC Case No. 2 of 2021 and not through a separate suit and urged the court to strike out this suit with costs.

Plaintiff/respondent's Submissions

17. Counsel relied on the replying affidavit by the Plaintiff and submitted that the provisions of section 1A, 1B, 3A and 63(e) of the Civil Procedure Act gives this honourable court a wide latitude of consolidating this suit with ELC No. 2 of 2021.
18. Mr. Sumba further submitted that the court ought to take into account that the plaintiff/ respondent's claim relates only to the ¼ acre of land occupied by Prestige Holiday Resort and that the claim in ELC case No. 2 of 2021 relates to other causes of action involving 6 other parties and urged the court to dismiss the defendant's application.

Analysis and Determination.

19. The issue for determination is whether this case is sub judice ELC No 2 of 2021 and if so should the court strike it out as an abuse of court process.
20. The doctrine of sub judice is provided for under section 6 of the Civil Procedure Act which states as follows: -

“..... No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”

21. The provision bars a court from proceeding with any suit or trial which the matter in issue is directly or substantially in issue in a previously instituted suit between the same parties over the same subject matter or pending in the same court having jurisdiction in Kenya to hear and determine the suit.
22. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR pronounced itself on the subject of *sub judice* as follows -

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.”



23. From the pleadings in this case and in Malindi ELC No 2 of 2021 which the court has perused, it is evident that both the plaintiff and the Defendant are parties to the suit whereby the subject matter is similar being LR. No. 8897 registered under Title No. CR.25828. This has been confirmed by both parties through the pleadings and the replying affidavit. This has further been admitted that the subject matter is the same, however the plaintiff wants monopoly of the case and does not want to litigate with other parties who are named in ELC No 2 of 2021. This would be duplication of cases yet the plaintiff's issues can be effectively ventilated via a counterclaim if she so wishes. In ELC No 2 of 2021.
24. Multiplicity of suits between the same parties and over the same subject matter should be avoided to allow proper utilization of judicial time, resources and minimize the risk of conflicting outcomes which can embarrass the court. This amounts to forum shopping and casting the net in different directions in the hope of favourable outcomes.
25. In the case of Kampala High Court Civil Suit No. 450 of 1993 - *Nyanza Garage vs. Attorney General* 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.”
26. I have considered the application, the submissions by counsel and the relevant authorities and find that this suit is sub judice ELC No 2 of 2021 and is therefore struck out with costs. The respondent urged the court to consolidate this suit with ELC No 2 of 2021 but I find that there is no need of consolidation as the plaintiff and the Defendant are parties to ELC No 2 of 2021. At the time of filing this suit the plaintiff was aware of the existence of ELC No 2 of 2021 hence the move to file this suit was an abuse of court process.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 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 Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

