



**Gitau v Muhoro & 3 others (Environment & Land Case
E010 of 2021) [2022] KEELC 3148 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E010 OF 2021**

LN GACHERU, J

JUNE 9, 2022

BETWEEN

RICHARD MAKARA GITAU PLAINTIFF

AND

SHADRACK MAINA MUHORO 1ST DEFENDANT

ESHER VICTORIA WANJIKU 2ND DEFENDANT

LAND REGISTRAR MURANGA 3RD DEFENDANT

LAND REGISTRAR THIKA 4TH DEFENDANT

RULING

1. *Vide* a notices of preliminary objection dated May 24, 2021, the 1st and 2nd defendants/ objectors objected against the hearing of the plaintiff's notice of motion application dated April 13, 2021, on grounds that;
 1. That the suit contravenes section 6 of the *Civil Procedure Act*, Cap 21, Laws of Kenya.
 2. That the application and the entire suit is frivolous, and an abuse of the court's due process and a waste of the courts time.
2. The notice of preliminary objection was canvassed by way of written submissions and the 1st & 2nd defendants/objectors through the Law Firm of Nyasani EN & Co Advocates, filed their submissions dated January 12, 2022, and submitted that the law on preliminary objections is well settled and that a preliminary objection should be on a pure point of law. That the preliminary objection is premised on the legal basis that the plaintiff's amended notice of motion application and plaint dated May 5, 2021, violated the provisions of section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, which provides for the doctrine of res sub-judice. It is their further submissions that the instant suit met all



the conditions necessary to establish *res sub-judice* and therefore the preliminary objection should be allowed.

3. That this court lacked jurisdiction to entertain the instant suit and notice of motion because they were both incurably defective. That there were several existing matters, involving the same subject matter, that had been filed in different courts. That the plaintiff was trying to create a multiplicity of suits based on the same facts and parties. Reliance was placed on the case of *Dr Kiama Wangai v John Mugambi & Another* (2012) eKLR, where the court held;
4. The above provision expressly bars a court from entertaining a matter in circumstances mentioned therein. Therefore where the court finds that the suits in question fall within the four corners of section 6 aforesaid, the court has no discretion in the matter but has to stay the subsequent suit or suits. However, it must always be remembered that the court is clothed with inherent jurisdiction to strike out proceedings which are deemed to be an abuse of the process of the court. Therefore where a party decides to file suit after suit between same parties with the same cause of action with either an intention of vexing or annoying his opponent, and without pursuing the first suit in the production line to its logical conclusion, that action may be construed to amount to an abuse of the process of the court”
5. Further reliance was placed on the case of *Barclays Bank of Kenya Limited v Elizabeth Agidza & 2 Others* 2012 eKLR, where the court held;
6. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, section 6 should be invoked to save the previous judicial resources.”
7. The objectors urged the court to find that the doctrine of *res sub-judice* had been properly invoked and then proceeded to dismiss the suit herein.
8. The plaintiff acting in person opposed the notice of preliminary objection via his written submissions dated March 21, 2022. It is the plaintiff’s submissions that the said preliminary objection is misconceived as it is premised on facts which are yet to be established. The plaintiff relied on a litany of cases in his submissions and urged this court to dismiss the preliminary objection with costs as it lacks merits.
9. The court has now carefully read and considered the instant notice of preliminary objection, the written submissions and the pleadings in general and finds that the issue for determination is;

i. Whether the Notice of Preliminary Objection is merited

10. What constitutes a preliminary objection was ably examined in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, which was emphasized by the Supreme Court of Kenya in the case of *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* [2014] eKLR as follows at paragraph 31:

”To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA 696: “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....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

11. Further Sir Charles Nebbold, JA in the Mukisa Biscuits Case supra stated that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

12. The Supreme Court in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR expanded the above principle and further gave the rationale for raising a preliminary objection. It delivered itself thus:

“1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose off the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.

2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. ...

3.

13. The Supreme Court in the aforementioned case went on to state that;

“The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and

2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

14. The above being the description of preliminary objection, it is evident 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 v 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 the instant case, the preliminary objection is premised on the main ground that the instant suit is *res subjudice*. Regard is put into section 6 of the [Civil Procedure Act](#) that sets out the threshold for holding that a suit is *res subjudice*, 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."
17. 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\(Interested parties\)](#)(2020)eKLR opined 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."
18. 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.
19. In the instant suit, the 1st & 2nd defendants/objectors have averred that there are several others suits involving the same parties and subject matter, to wit the said matters are Nairobi Rent Restriction Tribunal Case No 1132 of 2020, Muranga High Court Succession Miscellaneous Application No 3 of 2021, Thika ELC JR No 6 of 2020, Murang'a Succession Cause No 519 of 2020, Murang'a MCLE No E029 of 2021 and Murang'a CMCC No 118 of 2020. The objectors attached as evidence to this effect to their pleadings.



20. It is trite that submissions are not pleadings and are merely persuasive to the court. See the case of; [Robert Ngande Katbathi v Francis Kivuva Kitonde](#) [2020] eKLR where the court stated as follows;

"Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v Kenya Revenue Authority & Another* Kisumu HCCA No 46 of 2007:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

21. Further, the Court of Appeal in [Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another](#) [2014] eKLR:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

22. The purpose of the *sub judice* rule is to prevent the filing of multiple suits between the same parties or those claiming under the same subject matter so as to avoid an abuse of the court process. Based on the foregoing, for the court to decide whether or not a case falls under section 6 above, evidence must be laid before it to show that the parties were the same and the matters in issue were the same. In this respect therefore, it is doubtful that the issue of *sub-judice* can be raised as a preliminary objection in the instant suit. As stated by the Court of Appeal in *Mukisa Biscuits Manufacturing Co Ltd.* (supra)

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a preliminary objection may dispose of the suit"

23. The defendants/objectors submitted that the parties and the subject matter in this application /suit are the same as those in the suits stated above. The plaintiff on the other hand opposes the preliminary objection on the premise that it is based on contested facts which this court has conclusively determine. In the case of [Oraro v Mbaja](#) (2005) eKLR, the court held that: -

"I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed."

24. This court finds that in order to determine whether the rule of *sub judice* has been offended, the 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."

25. Further, this court is persuaded by the court's holding in George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another (2014) eKLR, where the court stated: -

"I have considered the points raised by the 1st defendant. All those points can be argued in the normal manner. They do not qualify to be raised as preliminary points. One cannot raise a ground of *res judicata* by way of preliminary objection. The best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are amended to enable the court to determine whether the current suit is *res judicata*."

26. Based on the foregoing decisions, it is this court's finding that the issue of *sub judice* arising from the present application and other matters as stated by the objectors will be better ventilated through a normal application to the court. The court needs more information than what is currently provided, to enable it make a proper determination as regards the issue of *sub-judice*. The issue of *sub-judice* cannot be determined by way of the preliminary objection for reasons explained above.

27. It is also the court's considered view that the issue of whether or not the instant suit is frivolous and/or an abuse of the court process is not a pure point of law, and will also require the probing of evidence and ascertainment of facts and cannot be raised as preliminary objection.

28. Therefore, this court holds and finds that what has been raised by 1st & 2nd defendants/objectors does not amount to a preliminary objection, and thus the said preliminary objection is not merited.

29. Consequently, the court finds and holds that the notice of preliminary objection dated May 24, 2021, by the 1st & 2nd defendants/objectors is not merited and the same is dismissed entirely with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF JUNE, 2022.

L.GACHERU

JUDGE

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Plaintiff - Absent

Mr Bore H/B Mr Nyasani for the 1st and 2nd Defendants/Objectors

N/A for the 3rd Defendant

N/A for the 4th Defendant

L.GACHERU

JUDGE



9/6/2022

