



**Alausi & another v Mussani & 8 others (Environment & Land Case
5 of 2021) [2022] KEELC 3745 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 5 OF 2021**

MAO ODENY, J

JULY 26, 2022

BETWEEN

MOHAMED ALI ALAUSI 1ST PLAINTIFF

KHALID BADI SUEDI 2ND PLAINTIFF

AND

ARBI ALI MOHAMED MUSSANI 1ST DEFENDANT

RODGERS KAIBUNGA 2ND DEFENDANT

JACOB KIRINYA NAIRUTI 3RD DEFENDANT

EMMANUEL KAZUNGU MASHA 4TH DEFENDANT

RENONS INGONGA 5TH DEFENDANT

KAMES MOUKO 6TH DEFENDANT

JOGI MOTOR LIMITED 7TH DEFENDANT

JOSEPH WAMBUGU 8TH DEFENDANT

KESREC AGENCY LIMITED 9TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of a Preliminary Objection dated February 1, 2022 by the 3rd defendant on the following grounds; -
 - 1) That this suit and the application filed herein is *sub judice* contrary to the provisions of section 6 of the *Civil Procedure Act*, cap 21 Laws of Kenya as there is another suit pending before this honourable court between the same parties touching on the same subject matter and the same



cause of action being Malindi ELC no 59 of 2017 Khalid Badi Swedi & 2 others vs Arbi Ali Mussani & 3 others.

- 2) That this suit is bad in law as it does not disclose any sustainable cause of action against the 3rd defendant herein.

3rd defendant's submissions.

2. Counsel submitted on the principle of *sub judice* is provided for in section 6 of the [Civil Procedure Act](#) and stated that at the time of instituting this suit, the plaintiffs herein despite having filed other matters in this court ELC 62 of 2014 were well aware that there was another matter pending before this honourable court between the same parties and touching on the same subject matter in Malindi ELC 59 of 2017 Khalid Badi Swedi & 2 others vs Arbi Ali Mussani & 3 others which has not been prosecuted to date.
3. Counsel relied on the cases of [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(interested Parties\)](#) (2021) eKLR and [ET v Attorney General & another](#) (2012) eKLR and that this suit having been filed during the pendency of the previous stated matter amounts to *sub judice*. Counsel also stated that the plaintiff's aim was to forum shop while at the same time waste the court's time.
4. Ms Mwanja submitted that Plot no 141 Malindi was subdivided in March 2013 and new portions were created complete with new deed plans as follows: -
 - i. portion no 13755 (orig 141 /2) Malindi
 - ii. portion no 13756 (orig 141/3) Malindi
 - iii. portion no 13757 (orig 141/4) Malindi
 - iv. portion no 13758 (orig 141/5) Malindi
 - v. portion no 13759 (orig 141/6) Malindi
 - vi. portion no 13760 (orig 141/7) Malindi
 - vii. portion no 13761 (orig 141/8) Malindi
 - viii. portion no 13762 (orig 141 /9) Malindi
 - ix. portion no 13763 (orig 141/10) Malindi
 - x. portion no 13764 (orig 141/11) Malindi
5. Counsel further submitted that the subject of this suit plot no 141 Malindi ceased to exist and therefore the reliefs sought are unattainable and disclose no cause of action against the 3rd defendant and so the plaintiff's suit is bad in law and an abuse of the court process.
6. Ms Mwanja also submitted that the plaintiffs entered into a memorandum of understanding with the defendants dated February 26, 2014 regarding the said subject matter, which has already been fulfilled by all parties and which is not in dispute at all, therefore the plaintiffs are barred from commencing these proceedings against the defendants under the doctrine of estoppel.



6th defendant's submissions

7. Counsel supported the preliminary objection and stated that the plaintiffs in this suit filed another suit ELC no 59 of 2017 and urged the court to strike out the suit as it is an abuse of court process.
8. Counsel relied on the cases of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex Parte Law Society of Kenya* (2020) eKLR and *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 others* (2009) eKLR.

Plaintiff's submissions

9. Counsel submitted on the doctrine of *sub judice* and stated that although *sub-judice* is a legal question, the determination as to whether the same applies in the context of a given case is premised on matters of fact. That this can only be established by bringing before the court as exhibit, the pleadings of actual case cited and the proceedings therein to prove the existence of the case and its status in the court process. That without a finding on this basic factual premise, the court cannot make a finding on the legal question of sub-judice and its application in a particular case since the court will not be able to find with certainty, the similarity of issues and the pendency of the case.
10. Counsel submitted that the 3rd respondent has not filed a Replying Affidavit in response to the motion dated January 25, 2021 hence the preliminary objection is without a factual premise.
11. It was counsel's further submission that an application for stay of proceedings on the ground that the same is sub-judice can only be made through a Notice of Motion and not a preliminary objection and cited the case of *George Kamau Kimani & 4 Others vs County Government of Transzoia & Another* (2014) eKLR where the court held that the defence of *res judicata* cannot be raised just by way of a preliminary objection but by a formal application. Counsel submitted that without annexing the pleadings of the cited cases and status of the same, this court is not in a position to make any conclusive finding on the relevant factual issues regarding the existence of the suits and their respective status and urged the court to dismiss the preliminary objection with costs.

Analysis and determination

12. It is trite law that a preliminary objection can only be raised on pure points of law and not factual issues that may require evidence to establish as was held in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR;

"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."

13. Similarly, in the case of *Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others* [2015] eKLR the Supreme court held that: -

The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement*. It is 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. Not all preliminary objections filed by parties meet the threshold of a preliminary objection. Some are meant to be swords for winning cases and upstaging their opponents without the real issues being determined on merit.
15. This preliminary objection is based on the doctrine of *sub judice* which is anchored on section 6 of the [Civil Procedure Act](#) and provides as follows: -
 6. 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.”
16. The plaintiffs in ELC Case no 59 of 2017 are Khalid Badi Swedi, Halima Hussein Ahmed and Mohamed Ali Alausi and the plaintiffs in the present case are Mohamed Ali Alausi and Khalid Badi Suedi, and as pointed out by the defendants, Halima Hussein Ahmed who was a plaintiff in the earlier suit is now deceased.
17. Further the subject matter in Land Case no 59 of 2017 is the property known as title number LT 21 Folio 817 FILE 3608 Portion no 141 Malindi whereas the subject matter in Land Case no 5 of 2021 is LR no 141 Malindi, title number LT 21 folio 817 file 306.
18. The applicant submitted extensively on the subdivision and new titles that were issued as a result of the subdivision. These are the issues that the court has to determine at the hearing of the suit. Is it disputed that the suit titles are the same, was there a subdivision of the suit land resulting to new titles, is the subject matter non-existent, if so then the court will make a determination and either dismiss the case or allow the prayers upon proof.
19. A preliminary objection cannot be raised on disputed facts and looking at the current case there are disputed facts which must be ascertained vide evidence as was held in the case of [Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another](#) (2014) eKLR , where the court held that:

“That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the preliminary objection by the 1st defendant is not a true preliminary objection in the sense of the law. 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 the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.
20. I find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF JULY, 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.

