



**Ogoi v Mogoi (Miscellaneous Application E226 of 2021)  
[2022] KEELC 12813 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12813 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E226 OF 2021  
OA ANGOTE, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**BEATRICE BOSIBORI OGOI ..... APPLICANT**

**AND**

**TOM OGENCHE MOGOI ..... RESPONDENT**

**RULING**

1. Before this court for determination is the applicant's notice of motion application dated December 7, 2021 brought pursuant to section 152E of the Land Act seeking the following reliefs;
  - i. That this court does issue an eviction order against the respondent, being the trespasser on the applicants' parcel of land known as Nairobi Block 82/3646 located at Donholm.
  - ii. That this honourable court be pleased to grant orders that the Officer Commanding Police Division(OCPD) Buruburu to provide security during the eviction.
  - iii. That this honourable court be pleased to issue a permanent injunctive order restraining the respondent whether by himself, his servants, employees, agents or any other persons acting under his instructions or his interests from entering, interfering with the applicants entry, occupation and possession, otherwise dealing, entering, remaining, trespassing or in any other manner interfering with all that parcel of land known as Nairobi Block 82/3464 located at Donholm.
  - iv. That costs of the application be provided for.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of the applicant who deponed that she is the owner of all that parcel of land known as Nairobi Block 82/3646 located at Donholm (hereinafter the suit property) having purchased the same from her then husband, the respondent.



3. According to the applicant, the parcel aforesaid was the subject of litigation in ELC Civil case 310 of 2010 where the respondent had sued her alleging that the parcel of land was matrimonial property and that on October 21, 2010, the court dismissed the respondent's application for injunction on the basis that the respondent, having sold the suit property to the applicant had not demonstrated that the property was matrimonial property nor demonstrated any ownership rights over the same.
4. The applicant deponed that on September 24, 2018, the respondent's suit was dismissed for want of prosecution; that the respondent filed an application for reinstatement of the suit which was dismissed on October 27, 2021 and that on April 28, 2021, she issued to the respondent with a 90-day notice to vacate the suit property pursuant to section 152E of the Land Act.
5. It is the applicant's case that the notice was duly served on the respondent, the Deputy County Commissioner, Embakasi Sub-County as well as the OCS Buruburu; that the respondent's counsel responded to the notice vide a letter dated June 29, 2021, a fact which affirms that the respondent received the notice and that the above notwithstanding, the respondent has refused to vacate the suit premises.
6. It is the applicant's deposition that through her counsel, she attempted vide the letter of November 11, 2021 to seek police assistance in evicting the respondent but was informed that the police could only offer assistance once there was a valid court order hence necessitating the present application; that the respondent's actions continue to infringe on her right to property and that unless the orders sought are granted, she stands to suffer irreparable harm.
7. In response to the application, the respondent filed grounds of opposition dated February 14, 2022 in which he averred that the court has no jurisdiction to entertain the application by virtue of section 7 of the Civil Procedure Act; that the cause of action is statute barred pursuant to the provisions of section 7 of the Limitation of Actions Act; that alternatively, this court lacks jurisdiction to entertain the matter as the property in issue is matrimonial property and that the matters herein should be canvassed in a matrimonial cause.
8. According to the respondent, the application ought to be premised on a substantive suit; that the applicant is guilty of non-disclosure of material facts and that the application is frivolous, vexatious and an abuse of court process.
9. In his replying affidavit, the respondent deponed that the Court is barred by sections 6 and 7 of the Civil Procedure Act from determining the application due to the existence of ELC 326 of 2010 which he filed against the Applicant seeking, inter-alia, a declaration that she was holding the suit property in trust for the family and for injunctive orders restraining her from interfering with his quiet possession of the suit property.
10. It was deponed by the respondent that the applicant never filed a counter-claim to the suit; that the applicant vide the applications of September 23, 2011 and January 25, 2013 sought dismissal of the respondent's suit and his eviction from the suit property, which orders are similar to those sought herein and that ELC 326 of 2010 was not determined on its merits as it was dismissed for want of prosecution on September 24, 2018.
11. According to the respondent, it is apparent that the issues in the present application being directly and substantially in issue in ELC 326 of 2010 ought to be canvassed therein; that to avoid multiplicity of actions, the applicant ought to have revived ELC 326 of 2010, filed a counter-claim and sought the present orders and that the application is further barred by section 7 of the Limitation of Actions Act as he has been in continuous and uninterrupted possession of the suit property for over 12 years.



12. It was deponed that the above notwithstanding, the application is premature as the respondent is yet to be served with a 3 month's notice of eviction pursuant to section 152E (1) of the [Land Act](#) and that if he had been served with the aforesaid notice, he would have filed an application in ELC 326 of 2010 to set it aside.
13. According to the respondent, the applicant is seeking for substantive orders which cannot be granted vide a miscellaneous application; that the application is premised on a misleading narrative, the true nature of the matter being that the suit property is matrimonial property which both parties charged to secure a loan from Co-operative Bank pursuant to which the property was transferred into the applicants' name and that after the parties became estranged, the applicant purported that rent was due from him leading to him filing ELC 326 of 2010 to protect his proprietary interests.
14. It is the respondent's case that the applicant lost her job leading him to fully repay the loan to avoid the sale of the suit property; that he has been singlehandedly maintaining the suit property through payment of land rent and rates and that from the foregoing, it is apparent that the applicant having come to court with unclean hands is not entitled to the equitable reliefs she seeks.
15. The respondent finally deponed that no court has conclusively determined the proprietorship of the suit property which in any event requires viva voce evidence; that the applicant has not established a prima facie case neither has she indicated what prejudice she stands to suffer if the prayers she seeks are not granted and that it is him with the children who will be greatly prejudiced by the orders of eviction.
16. In her supplementary affidavit, the applicant deponed that the respondent has misapprehended the principles of *res judicata* and sub judice which are inapplicable of being granted in the present circumstances and that there is no pending case between the parties, ELC 326 of 2010 and the application for reinstatement having been dismissed on September 24, 2018 and October 27, 2021 respectively.
17. It was deponed by the applicant that the [Limitation of Actions Act](#) is equally inapplicable as the respondent has engaged her in litigation over the suit property for about 11 years; that the respondent's claim for contributory interest is misguided and ought to have been ventilated in ELC 326 of 2010 and that it is undisputed that she is the duly registered owner of the suit property.

## Submissions

18. The applicant's counsel submitted that section 6 of the [Civil Procedure Act](#) provides for the principle of *sub judice*; that in the present circumstances, there is no pending suit ELC 326 of 2010 having been dismissed; that the doctrine of *res judicata* is provided for in section 7 of the [Civil Procedure Act](#) and that that ELC 326 of 2010 having been dismissed, it follows that the applicant's application was not determined and as such the principle of *res judicata* does not lie.
19. It was submitted by counsel for the applicant that the present application is not time barred as it is the respondent who has kept the applicant in court litigating over the suit property for 11 years and that the applicant is entitled to the orders sought having duly served the respondent with an eviction notice pursuant to section 152E of the [Land Act](#).
20. Reliance in this respect was placed on the case of [Margaret Kawirwa Mwongera v Francis Kofi](#)[2019]eKLR where the court granted eviction orders in an application for eviction brought pursuant to the provisions of section 152E and that section 152F provides the respondent with an avenue for relief upon being served with the eviction notice which the respondent has failed to exercise and as such, he is obligated to vacate the property.



21. The respondent’s counsel submitted that the present application violates the principle of *sub judice* as set out in section 6 of the [Civil Procedure Act](#) and defined by the Supreme Court of Kenya in [National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others](#)( Interested Parties)[2020]eKLR and that the matters in the application are similar to those in ELC Civil suit 326 of 2010.
22. It was submitted that it is undisputed that the respondent has been in open, continuous and uninterrupted occupation of the suit property for more than 15 years; that that the application is time barred by virtue of section 7 of the [Limitation of Actions Act](#) which provides that no action for the claim of the property can be brought after 12 years and that the applicant is seeking for substantive orders of eviction and injunction vide a miscellaneous application contrary to section 19 of the [Civil Procedure Act](#) which provides for the mode of institution of suits.
23. It was submitted that the applicant has further failed to adhere to the provisions of section 152A-H of the [Land Act](#). counsel relied on the cases of [Tatecob Housing and Co-op Sacco Limited v Qwetu Sacco Limited](#) [2021]eKLR and [Wambui Gikwa v Paul Kimani Muraba](#)[2017]eKLR where the courts found that substantive orders must be anchored on a suit and cannot be brought *vide* a miscellaneous application.

### **Analysis and Determination**

24. The respondent is challenging the competency of the present application on three main grounds; firstly, that the application offends the principles of sub judice and res judicata; secondly, that the application is time barred and lastly that the application is fatally defective for seeking substantive orders vide a miscellaneous application.
25. On whether this suit is sub judice, section 6 of the [Civil Procedure Act](#) provides that:
 

“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 proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
26. As correctly submitted by the parties, the rationale behind the principle of *sub judice* was discussed by the Supreme Court in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others](#) (Interested Parties) [2020] eKLR as follows;
 

“The term ‘*sub-judice*’ is defined in [Black’s Law Dictionary 9<sup>th</sup> 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.”



27. It is clear from the foregoing that the principle of sub judice seeks to act as a bar to the filing of multiple suits over the same issues which not only unnecessarily clog the already stressed court system, but also have the potential to cause embarrassment through conflicting decisions.
28. The respondent asserts that the present application is *sub-judice* ELC 326 of 2010 whose pleadings he has produced *vide* his replying affidavit. Having considered the same and tested them as against the considerations outlined by the Supreme Court in Kenya National Human Rights Commission case(supra), it is evident that the respondent’s argument will fail.
29. Whereas ELC 326 of 2010 was instituted before the present application, and both the suit and this application relate to the same subject matter being LR No Nairobi Block 82/3646 situate at Donholm, ELC 326 of 2010 was dismissed for want of prosecution on April 28, 2018. It therefore follows that the suit is no longer pending and cannot be subject to the principles of *sub judice*.
30. On whether this suit is *res judicata*, section 7 of the [Civil Procedure Act](#) states as follows:
- “No court shall try any suit or issue in which the matter 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 of 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.”
31. In [Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd](#) [2017] eKLR the Court of Appeal defined *res judicata* thus;
- “The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit;
- (a) The suit or issue was directly and substantially in issue in the former suit.
  - (b) That former suit was between the same parties or parties under whom they or any of them claim.
  - (c) Those parties were litigating under the same title.
  - (d) The issue was heard and finally determined in the former suit.
  - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
32. It is apparent from the foregoing that courts are prohibited from determining matters in which the same parties are litigating on issues which are substantially similar, and were adjudicated upon in a previous suit by a competent court or tribunal with finality.
33. Having already discussed the similarity between the present application and ELC 326 of 2010, and the status of ELC 326 of 2010, the question that lends itself is whether a dismissal of a suit for want of prosecution is tantamount to a final determination. In the courts opinion, dismissal for want of prosecution does not amount to conclusive determination of the issues in dispute and it is for this reason that a party whose suit is dismissed can apply for reinstatement.
34. The Court of Appeal in the case of [Ahmed Noorani v Joyce Akinyi Ochieng](#) [2017] eKLR, whilst dealing with an objection on the grounds of *res judicata* in a situation where an application for committal had



- been dismissed for non-service on the respondent, and a new application was brought, found that the new application was not *res judicata* as the judge who dealt with the dismissed application had not delved into the merits of and did not make conclusive findings thereon.
35. The court in Ahmed Noorani (supra) cited with approval a previous decision by the Court of Appeal in the case of *Suleiman Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR where the court had stated thus:-
- “To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
36. This position was more succinctly expressed by the Court of Appeal decision in *Michael Bett Siror v Jackson Koech* (2019) eKLR where the court held as follows; -
- “We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment. However, such a judgment does not satisfy the requirements of section 7 of the *Civil Procedure Act*, as the issues raised in the suit have not been addressed and finally determined by the court, but the judgement is the result of what may be described as a technical knockout.”
37. Guided by the foregoing, it is the opinion of the court that this application does not offend the doctrine of *res judicata*, ELC No 326 of 2010 having been dismissed for want of prosecution. Indeed. Considering that ELC No 326 of 2010 was filed by the respondent, the applicant could not apply for the reinstatement of the suit as argued by the respondent. It is only the applicant, being the plaintiff, who could have applied for the reinstatement of the suit.
38. With respect to the suit being time barred, section 7 of the *Limitation of Actions Act* provides as follows:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
39. In the case of *Gathoni v Kenya co-operative Creamers Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows:-
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
40. The application herein seeks to have the respondent evicted from the suit property. According to the respondent, he has been in continuous and uninterrupted occupation of the suit property for over 15 years and that the applicant’s claim is thus stale. On her part, the applicant avers that the parties have been litigating over the suit property for 11 years at the instance of the respondent and as such the claim is not statute barred.
41. The evidence before this court shows that indeed the parties have been in court over the suit property for more that 10 years, until when ELC 326 of 2010 was dismissed for want of prosecution. Considering that the filing of a suit stops time from running, and in the absence of evidence to show that the respondent has been on the land for 12 years since ELC 326 of 2010 was dismissed, I decline to strike out the suit on the ground that the suit is time barred.



42. The respondent has argued that the application seeks substantive orders which cannot be granted vide a miscellaneous application. In response, the applicant avers that being the owner of the suit property, the provisions of section 152E of the Land Act, 2012 only requires her to serve a 90day notice of eviction. Section 152E of the Land (amendment) Act provides as follows;

“(1) if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.”

43. While noting that the above section gives the owner of property the right to evict a person unlawfully occupying his property, the court is of the view that section 152E envisages a situation where there is no dispute over the ownership and occupation of the suit property.

44. On the contrary, the respondent herein claims ownership of the suit property, to the extent that he filed ELC No 326 of 2010 which was dismissed for want of prosecution. That being the case, the applicant ought to have filed a substantive suit for the recovery of the suit property to enable the court determine the rights of both parties, after taking viva voce evidence. Indeed, it is now generally accepted that substantive orders cannot be issued in miscellaneous applications. This is the position that was adopted by Limo J. in Witmore Investment Limited vs County Government of Kirinyaga & 3 Others [2016] eKLR where he held as follows:

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

45. The law is clear on the manner of institution of suits. Order 3 rule 1 of the Civil Procedure Rules stipulates that a suit may be commenced by way of a plaint, or any such manner as may be prescribed which, include a petition/or originating summons. As correctly submitted by the respondent, article 40 of Constitution protects the rights to property whilst article 50 of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing.

46. That being the case, the fact that the applicant issued to the respondent an eviction notice can only be used as evidence during the prosecution of a substantive suit. The same cannot be an avenue for a party to file a miscellaneous application to avoid the rigours of an oral hearing.

47. In the end, the court finds that the application is not merited and the same is struck out with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.**

**O.A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Mutunga for Applicant

No appearance for Respondent



