



**Nkoitiko v Lengeny (Environment & Land Case 11 of 2020)
[2022] KEELC 12677 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 11 OF 2020
CG MBOGO, J
SEPTEMBER 27, 2022**

BETWEEN

MARTINEI OLE NKOITIKO PLAINTIFF

AND

ITA OLE LENGENY DEFENDANT

RULING

1. What is before this court for determination is a notice of preliminary objection dated March 17, 2021 expressed to be brought under order 51 rule 4 and 14 of the [Civil Procedure Rules](#) and section 7 of the [Civil Procedure Act](#) seeking to strike out the suit on the following grounds: -
 - a) That the claim is filed contrary to section 6 of the [Civil Procedure Act](#) and the court lacks jurisdiction to grant the orders prayed for as the suit is sub-judice.
 - b) That the claim as against the defendant is sub-judice as the matter in issue is directly in issue in ELC No 198 of 2018 (Ita Ole Lengeny versus Martinei Ole Nkoitiko) which suit is between the same parties herein litigating over the same subject matter.
 - c) That the claim is a disguised attempt by the claimant to have the court adjudicate the issue between the same parties and on the same subject matter yet the same is being adjudicated in the Chief Magistrate Court at Narok as ELC Case No 198 of 2018.
 - d) That the claim is tantamount to trifling with the court process and is an abuse of the court process since in both suits; the applicant is claiming the same parcel of land NrK/Cis-Mara/Ewaso-Nyiro/206.
2. The defendant also filed undated grounds of opposition in court on April 8, 2021 challenging the plaintiff's originating summons on the following grounds: -



1. That the plaintiff did not and or have not acquired an interest over the suit land by adverse possession capable of being protected by the law.
 2. The plaintiff has no *prima facie* case with a probability of success since his entry into the suit land as alleged (which is vehemently denied) was by permission and or agreement.
 3. The originating summons on a claim for adverse possession is an attempt by the applicant to steal a march against the respondent on an issue he has been trying to negotiate his entry to the suit property without success. The applicant has made baseless claims for allegedly being a purchaser of interest but never took possession.
 4. The applicant's claim for adverse possession cannot arise where the entry has been through agreement or permit. The respondent has been utilizing the suit property since he was allotted the same by the group ranch to date where he ploughs part of the property and partly utilised as grazing field for his livestock. The respondent further avers that he at some point leased out part of the property to third parties.
 5. The respondent being the registered owners of the suit land and being in actual possession of the entire property is vested with rights which are recognised by law and which should be protected as such.
 6. The applicant possession of the suit property (which is denied) was permissive and or consensual this possession not *nec vi, nec claim, nec precario* as required by the law.
 7. The applicant's cause of action as against the respondent on account of adverse possession is denied as the respondent being the registered owner of the land has never been dispossessed of his land therefore title by way of adverse possession had not accrued.
3. The plaintiff did not file a response to the notice of preliminary objection and neither did he file written submissions despite engaging the services of a different advocate. The defendant filed written submissions dated January 26, 2021. The defendant submitted that the plea of sub-judice has properly been invoked in this case. The defendant relied on the pleadings and orders issued in ELC Case No 198 of 2018, the cases of *Mukisa Biscuit Manufacturing Co Limited versus West End Distributors Ltd* (1969) EA 696, *Dr Kiama Wangai versus John Mugambi & Republic* [2012] eKLR, *DSV Silo versus The Owners of Sennar* [1985] 2 ALL ER 104 and section 6 of the *Civil Procedure Act*.
 4. I have analysed and considered the notice of preliminary objection and the written submissions filed by the defendant and the issue for determination is whether this matter is sub-judice.
 5. On the issue of what constitutes a preliminary objection, I make reference to the case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* (1969) EA 696, where it was held that:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion.”



6. The issue raised in the preliminary objection before me is that this matter is sub-judice for the reasons that the matter in issue is directly in issue in ELC Case No 198 of 2018 filed in the magistrates' court. It is my considered view that sub-judice issue is a matter of law which if argued as a preliminary point may dispose of the suit.

7. Section 6 of the [Civil Procedure Act](#) provides as follows on the issue of sub-judice:

“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.”

8. 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 had occasion to pronounce itself on the subject of sub-judice. It aptly stated: -

[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.

[68] In the above context, it cannot be denied that the issues and prayers sought by the petitioner in the two constitutional petitions generally call for the interpretation and application of provisions of chapter six of the [Constitution](#). The issues and orders in the two constitutional petitions substantially ascend from the criteria for the implementation of the provisions of chapter six of the [Constitution](#). For the High Court to sufficiently pronounce itself in the two constitutional petitions, it has to interpret and apply the provisions of chapter six of the [Constitution](#) on leadership and integrity.

[69] In Constitutional Petition No 142 of 2017, the petitioner challenges the constitutionality of the working group as well as the criteria on the implementation of the provisions of chapter six of the [Constitution](#) as established by the working group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the working group.

[70] In Constitutional Petition No 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that



it threatens and violates the provisions of the Constitution. For the High Court to determine the constitutionality of the requirement for clearance challenged by the petitioner in Constitutional Petition No 68 of 2017 or the working group criteria as well as the ‘resolution on complimentary framework of collaboration by agencies to ensure compliance with leadership and integrity requirements in August 2017 general elections’ and ‘compliance with leadership and integrity requirements in the 2017 general elections’ challenged in Constitutional Petition No 142 of 2017, it has to examine, interpret and apply the provisions of chapter six of the Constitution.

[71] In so doing, the High Court shall be compelled, to determine whether a constitutional test is set up in chapter six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the advisory opinion sought by the applicant comprised at pages 13 to 19 of the reference before this court.

[72] We therefore find that this reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of article 165 of the Constitution, the High Court is the court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that court has already been moved.

[73] Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under article 163(6) of the Constitution. This reference is sub-judice and this court will not usurp the High Court’s jurisdiction under article 165 (3).”

9. I have had the privilege to peruse ELC Case No 198 of 2018. The matter is filed at the Chief Magistrates’ Court and the parties are Ita Ole Lengeny as the plaintiff and Martine Ole Nkoitiko as the defendant. The subject matter relates to claim of ownership of plot number Narok Cis-Mara/Ewasonyiro/206 where the plaintiff is seeking an order of permanent injunction.
10. The instant suit is filed through an originating summons where the parties are similar to the matter in ELC Case No 198 of 2018 save that the applicant is the defendant in the previous matter and the respondent is the plaintiff. The subject matter involves claim of ownership of the same parcel of land now being claimed under adverse possession.
11. In my considered view, and having analysed the pleadings in both files, I do note that both parties are similar in both matters and the subject matter is similar as it relates to a claim of ownership over plot number Narok Cis-Mara/Ewasonyiro/206. The only difference is the approach which both parties have utilised to come to this court. The root cause which is vital in determining the issue in dispute is the subject matter which is similar in both matters.
12. More importantly is that ELC Case No 198 of 2018 is active before the Magistrates’ Court with a further mention date slated for November 15, 2022. It would be unfair to proceed and entertain any further dealings with this matter as it would ultimately affect the progress or otherwise of ELC Case No 198 of 2018.
13. I will not belabour much on what the courts have often stated on multiplicity of suits and the overall effect it has on the efficiency of the justice system. Consequently, it is my finding that although the



manner of approach before the court differs, they affect the same parties and the issues touch on the same parties in this matter.

14. Arising from the above, the notice of preliminary objection dated March 17, 2021 succeeds. The originating summons dated June 12, 2021 is hereby struck out. Each party to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED virtually at Narok this 27TH day of SEPTEMBER, 2022.

HON. C.G. MBOGO

JUDGE

27/09/2022

In the presence of:

CA:Chuma

Mr Langat for the respondent

N/A for the applicant

