



**Kiyo & another v Kangemi Rumwe Women Group Limited & 3 others; Njuguna (Interested Party)
(Constitutional Petition E001 of 2022) [2022] KEELC 14467 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CONSTITUTIONAL PETITION E001 OF 2022**

**MD MWANGI, J
OCTOBER 31, 2022**

BETWEEN

MARY KIYO 1ST PETITIONER

REGINA NUNGARI NJOROGE 2ND PETITIONER

AND

KANGEMI RUMWE WOMEN GROUP LIMITED 1ST RESPONDENT

JANE WANJIRU JAMES 2ND RESPONDENT

IRENE WANJIRU NGUGI 3RD RESPONDENT

SERAH MUTHONI MUNYWA 4TH RESPONDENT

AND

JOSEPHINE WAITHIRA NJUGUNA INTERESTED PARTY

*(In respect of the Respondent's Preliminary Objection
dated 18th January, 2022 on the issue of sub-judice)*

RULING

Background

1. The respondents in this matter filed a notice of preliminary objection dated January 18, 2022 seeking to strike out the petition on the grounds that;
 - a. The honourable court lacks the requisite jurisdiction to take cognizance of, hear and determine the petition and application which are sub-judice the proceedings in HCCC/E297/2021 Kangemi Rumwe Women Group Limited & Serah Muthoni Munywa (suing as the Secretary &



on behalf of the members of Kangemi Rumwe Women Group) v Josephine Waithira Njuguna & 2 others.

- b. The matter in issue in the petition and application is also substantially in issue in HCCC/E297/2021 Kangemi Rumwe Women Group Limited & Serah Muthoni Muniywa (suing as the Secretary & on behalf of the members of Kangemi Rumwe Women Group) v Josephine Waithira Njuguna & 2 others, between the same parties litigating under the same title.
 - c. The petition and application are defective, vexatious and an abuse of the process of the court.
2. The preliminary objection is opposed by the petitioners *vide* the replying affidavit of Mary Wanjiru Kiyu, the 1st petitioner sworn on May 31, 2022. She states that she learnt that HCCC/E297/2021 (Kangemi Rumwe Women Group Limited & Serah Muthoni Muniywa {suing as the Secretary and on behalf of the members of Kangemi Rumwe Women Group} v Josephine Waithira Njuguna & 2 others) was filed by the 1st respondent in this petition against the interested party. She deposes that she is not a party in the said suit, HCCC E297/2021. Further that it raises different issues from the petition before this court. The deponent insists that the petition herein raises purely constitutional issues; more particularly her property rights and those of the members of the 1st respondent (Kangemi Rumwe Women Group).
 3. The deponent further asserts that the court in HCCC/E297/2021 does not have the jurisdiction to grant the orders sought in the present petition. She reiterates that this court has jurisdiction under section 13(3) of the [Environment and Land Court Act](#) and can grant the prayers sought under this petition on infringement of fundamental human rights under the bill of rights. In any event, a notice of preliminary objection has already been filed in HCCC/E297/2021 challenging the High Court's jurisdiction to entertain the matter before it. It will therefore not be prudent to stay the proceedings herein as the jurisdiction of the High Court is already contested. She prays that the notice of preliminary objection be dismissed with costs as it is aimed at hindering the court from undertaking its constitutional mandate of protecting rights guaranteed in the bill of rights.

Court's Directions

4. The court's directions were that the preliminary objection be disposed of by way of written submissions. Both parties complied. The respondents filed their submissions dated the June 24, 2022 whereas the petitioners filed their submissions dated the August 30, 2022.

Respondent's Written Submissions

5. The respondents submit that the issues for determination are: -
 - a. Whether the petition is filed contrary to section 56 of the [Trustee Act](#), cap 167 and ought to be struck out.
 - b. Secondly, whether the petition is sub-judice to HCCC/E297/2021 and therefore an abuse of due process of this court.
6. The respondents submit that this court lacks the jurisdiction to hear and determine the petition by the petitioners. That the suit property, title number Dagoretti/ Kangemi/1029 is vested in the names of Josephine Waithira Njuguna, Lilian Wahu Kiganya (deceased) and Beatrice Wajanja Kamau (deceased) who held it in trust and on behalf of the Women Group, comprising 30 members.
7. They submit that the Women Group held a meeting in which it resolved to incorporate the 1st respondent as a 'company limited by guarantee'. However, the interested party being the trustee of the



Women Group refused to comply with the resolution. It was then that the 1st and 4th respondents instituted the suit in the High Court in line with the provisions of section 56 of the Trustee Act, cap 167 of the Laws of Kenya.

8. They further submit that the instant petition seeks a mandatory injunction compelling the respondents to have all the 30 members of the Women Group included as members of the 1st respondent before the interested party agrees to transfer the property to the members. The matter in the High Court on the other hand seeks to compel the interested party to comply with the resolution of the Women Group.
9. The respondents submit that there is totally no violation of article 40 of the Constitution as against the petitioners as their inclusion as members of the 1st respondent can be done under section 56 of the Trustees Act. They rely on the case of Republic v Paul Kariuki, Attorney General & 2 others ex parte Law Society of Kenya (2020) eKLR.
10. On the second issue as to whether the petition is sub-judice to HCCC/E297/2021 and an abuse of due process of this court, the respondents submit that the petition ought to be stayed pending the outcome of HCCC/E297/2021.
11. The respondents further submit that the issues in both HCCC/E297/2021 and the petition, more specifically the reliefs sought by the parties, are substantially the same and there is no justification for having the two matters proceeding concurrently. The petition is filed contrary to section 56 of the Trustees Act and further violates the doctrine of sub-judice and should be struck out with costs to the respondents.

Petitioner's Written Submissions

12. The petitioners oppose the preliminary objection. The petitioners argue that the petition is not sub judice. They further submit that *sub judice* is not a pure point of law since the court will require to substantively evaluate the evidence before it to establish whether the issues raised in this petition are substantially the same as those raised in HCCC/E297/2021. That is outside the scope of a preliminary objection which must substantively be on pure points of law. The preliminary objection by the respondents is therefore incompetent. They cite the case of Margaret Wachu Karuri v John Waweru Ribiro (2021) eKLR and Cyrus Mucebiu Irungu v Martha Wanjiru Irungu & another (2022) eKLR to augment their position.
13. The second limb of the petitioners' submissions is that the petition is not sub judice as the conditions for sub-judice have not been met. The conditions for *sub judice* are that;
 - a. There is more than one suit over the same subject matter and that one suit was instituted before the other.
 - b. That both suits are pending before courts of competent jurisdiction, and lastly
 - c. That the suits are between the same parties or their representatives.
14. The petition and HCCC/E297/2021, according to the petitioners, are substantially different, and the petitioners herein are in any event not parties in HCCC/E297/2021. That the petition raises pure constitutional issues particularly infringement of the petitioners' property rights and those of members of Kangemi Rumwe Women Group, contrary to article 40 of the Constitution. Therefore, this court has jurisdiction to hear the dispute herein. The preliminary objection should be dismissed with costs.



Issues for Determination

15. The court has carefully read and considered the preliminary objection together with the replying affidavit, and the rival written submissions filed by the parties. The issue for determination first and foremost is whether the preliminary objection qualifies as such.

Analysis and Determination

16. A preliminary objection was described in the famous case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

“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 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”.

17. Further Sir Charles Newbold, JA 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”.

18. A preliminary objection cannot be raised and should not be entertained if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

19. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

20. The doctrine of *sub judice* is premised under section 6 of the [Civil Procedure Act](#), which provides as follows;

“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.”

21. Numerous decisions have been made on the issue of sub judice. The Supreme Court in the case of [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others](#) (2012) eKLR held that;

“The purpose of 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-----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 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”.

22. In the case of *Margaret Wachu Karuri v John Waweru Ribiro* (2021) e KLR, the court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by (the) defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.”

23. That is exactly the nature of the preliminary objection before me. For the court to determine whether the issues herein are directly and substantially in issue in HCCC/E297/2021, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant petition are the same as the ones in the HCCC/E297/2021 aforesaid and further interrogate the prayers sought; whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts simply have to be ascertained.
24. Accordingly, I find and hold that what has been raised by respondents does not amount to a ‘preliminary objection’, and is therefore not merited. The same is hereby dismissed with costs to the petitioners.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ochieng for the Respondents.

No appearance for the Petitioners & Interested Party.

Court Assistant: Hilda.

M.D. MWANGI

JUDGE

