



REPUBLIC OF KENYA



**Kuria v Wanjohi (Environment & Land Case 275 of 2022)
[2022] KEELC 15587 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 275 OF 2022**

**JO MBOYA, J
NOVEMBER 21, 2022**

BETWEEN

MICHAEL MBUGUA KURIA APPLICANT

AND

JOSEPH KINGORI WANJOHI RESPONDENT

RULING

Introduction And Background.

1. The Ruling herein relates to three separate and distinct Applications. For clarity, the Applications are dated August 31, 2022, September 23, 2022 and September 26, 2022, respectively.
2. Vide the Application dated August 31, 2022, the Plaintiff has sought for the following reliefs;
 - i. This Application be certified as urgent and be heard *ex-parte* in the first instance.
 - ii. Pending the hearing of this Application *inter-partes*, this Honourable Court be pleased to issue a temporary injunctive order restraining the Defendant/Respondent by himself, his servants, employees, agents or any other persons acting under his instructions or in his interest from evicting the Applicant from, preventing entry onto, interfering with the Applicant's peaceful possession and occupation of and in any manner interfering with all that parcel of land reference No 36/VII/413.
 - iii. Pending the hearing and determination of the main suit, this Honourable Court be pleased to issue a temporary injunctive order restraining the Defendant/Respondent by himself, his servants, employees, agents or any other persons acting under his instructions or in his interest from evicting the Applicant from, preventing entry onto, interfering with the Applicant's peaceful possession and occupation of and in any manner interfering with all that parcel of land reference No 36/VII/413.



- iv. Costs of this Application be provided for.
 - v. This Court issues any further orders that it may deem in the best interest of justice and fairness.
3. The subject Application is premised and anchored on the various, albeit numerous grounds which have been enumerated at the foot of the Application, and the Application is similarly supported by the Affidavit sworn by Michael Mbugua Kuria on even date.
 4. Though served, there is no evidence that the Defendant/Respondent has ever filed any response, either by way of a Replying Affidavit or Grounds of Opposition.
 5. Be that as it may, it is appropriate to state and observe that the Defendant/Respondent herein, proceeded to and filed a separate and distinct suit, namely ELC E 287 of 2022 and in respect of which same also filed an Application dated September 9, 2022.
 6. For completeness, the said Application dated September 9, 2022 also seeks for orders for temporary injunction against the current Plaintiff herein.
 7. The 2nd Application has similarly been filed by the Plaintiff herein. For convenience, the Application herein is dated September 23, 2022 and same seeks the following reliefs:
 - i. This Application be certified as urgent and be heard *ex-parte* in the first instance.
 - ii. That pending the hearing and determination of this Application, an urgent temporary injunction do issue restraining the Defendant, his servants and/or agents from entering, remaining inside, excavating, wasting, damaging or alienating, selling and/or otherwise interfering with the suit parcel and the Plaintiff's occupation and tenants therein. The area OCPD and/or the OCS Pangani Police Station to ensure compliance with the order.
 - iii. That *status quo* as at *status quo* as at September 12, 2022 to continue subsisting and particularly; that the Plaintiff to continue having unlimited access and use of the suit property pending the hearing and determination of this Application.
 - iv. The Defendant be cited for contempt of court and be punished therefore by imprisonment for such a period of time as the court may in its discretion direct or in such other manner as the court may decide.
 - v. That the OCS Eastleigh North Police Station be cited for contempt of court and be punished therefore by imprisonment for such a period of time as the court may in its discretion direct or in such other manner as the court may decide.
 - vi. The Defendant be ordered to purge the contempt by making good the damage done to the suit property at his cost and in such a manner as the court may direct.
 - vii. The costs of this application be provided for.
 8. Upon being served with the Application dated September 23, 2022, the Defendant herein filed a Replying Affidavit sworn on October 3, 2022 and in respect of which same has averred inter-alia that the impugned order was only served on September 12, 2022, long after same had procured orders of a similar nature vide ELC No. E287 of 2022.
 9. Vide the Application dated September 26, 2022, the Defendant has sought for the following reliefs;
 - a. That this Application be and is hereby certified as urgent and service thereof be dispensed with in the first instance.



- b. That the Honourable court be pleased to strike out the instant suit for duplicity of suits and want of service and offending the *Sub-judice* rule.
 - c. That the Application herein be heard on a priority basis and before all other pending applications.
 - d. That the Honourable Court be pleased to issue such further orders it deems just and convenient in the circumstances of the case.
10. The instant Application is premised on the grounds contained and enumerated at the foot thereof and same is further supported by the Affidavit of Joseph Kingori Wanjohi, sworn on even date.
 11. Despite the Application being served, there is no evidence that the Plaintiff has since filed any response thereto, either by way of Replying Affidavit or Grounds of Opposition.
 12. Nevertheless, it is imperative to observe that the Plaintiff herein, who is the Defendant in the parallel suit, namely ELC No E287 of 2022 has also filed a similar Application seeking to strike out the parallel suit.
 13. Be that as it may, the subject matter came up on October 19, 2022, whereupon the court ordered and directed that all the Applications filed by the respective parties be canvassed and disposed of simultaneously.
 14. Additionally, the court proceeded to and directed that the Applications be canvassed and disposed of by way of written submissions.
 15. To this end, it is worthy to note that both parties duly filed their respective submissions. For completeness, the Plaintiff filed his written submissions on October 13, 2022, whereas the Defendant filed his written submissions on October 18, 2022.

Submissions By The Parties

a. Plaintiff's Submissions

16. Vide the written submissions dated October 13, 2022, the Plaintiff has identified, isolated and highlighted three pertinent issues for consideration.
17. First and foremost, counsel for the Plaintiff has submitted that the Plaintiff herein and another, namely, Ernest Njenga Kiruku, bought and purchased L R No 36/VII/413 (hereinafter referred to as the suit property) from one Joel Ndungu Jeremiah, now deceased.
18. Further, counsel for the Plaintiff has added that upon the purchase of the suit property, details in terms of the preceding paragraph, the suit property was duly and lawfully transferred and registered in the name of the Plaintiff and Ernest Njenga Kiruku, as tenants in common, each holding half share.
19. Besides, counsel has submitted that the Registration of the suit property in favor of the Plaintiff and his co-owner was perfected on the basis of an Indenture registered at the land registry on July 16, 1993.
20. In the premises, counsel for the Plaintiff has contended that the Plaintiff therefore has lawful and legitimate rights to and in respect of the suit property and thus same has established a prima facie case with overwhelming chances of success.
21. Additionally, counsel for the Plaintiff has also submitted that by virtue of being the lawful and legitimate proprietor of the suit property, the Plaintiff herein shall be disposed to suffer irreparable loss, unless the orders of temporary injunction are granted.



22. In the premises, counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Application herein is merited and thus ought to be granted.
23. Secondly, counsel has submitted that upon the filing of the Application dated August 31, 2022, same was duly placed before the Honourable Judge and thereafter the Application was certified as urgent.
24. Similarly, counsel for the Plaintiff/Applicant has contended that upon the Application being certified as urgent, the court proceeded to and granted orders for the maintenance of status quo over and in respect of the suit property, pending further direction pertaining to and concerning the said application.
25. Nevertheless, counsel has added that despite the issuance and service of the orders of status quo, the Defendant herein proceeded to and evicted the Plaintiff and his tenants from the suit property. For clarity, counsel has submitted that the impugned eviction was carried out and undertaken on September 16, 2022.
26. Premised on the foregoing, counsel for the Plaintiff has submitted that the impugned actions and activities by the Defendant constitute and amount to contempt of court.
27. In view of the foregoing, counsel for the Plaintiff has therefore submitted that the Defendant is guilty of willful disobedience and contempt of lawful court orders.
28. Thirdly, counsel has submitted that the Defendant's Application dated September 26, 2022 is an abuse of the due process of the court, insofar as the alleged suit, namely ELC E287 of 2022, was filed long after the instant suit had been filed and duly registered with the court.
29. Consequently, counsel for the Plaintiff has added that if there is a suit which is bad for duplicity, then it is the one which was filed subsequently and not otherwise.
30. Based on the foregoing, counsel for the Plaintiff has contended that the Application dated September 26, 2022, is not only misconceived but amounts to an abuse of the due process of the court.
31. Essentially, counsel for the Plaintiff has sought that the court be pleased to allow the Applications dated August 31, 2022 and September 23, 2022, while on the other hand the court ought to dismiss the Application dated September 26, 2022.

b. Defendant's Submissions

32. On his part, the Defendant filed written submissions dated October 18, 2022 and same has similarly itemized, highlighted and canvassed three issues for determination.
33. The first issue that has been highlighted and amplified relates to whether the Plaintiff has established a prima facie case with overwhelming chances of success, to warrant the grant of an order of temporary injunction.
34. To this end, counsel for the Defendant has submitted that the suit property lawfully belongs to and is registered in the name of the Defendant pursuant to and by dint of an Indenture which was duly registered at the lands registry on July 16, 1993. In this regard, the Defendant has therefore contended that same is the lawful and legitimate proprietor of the suit property.
35. Similarly, counsel for the Defendant has added that the Indenture which has been annexed and exhibited by the Plaintiff herein is fictitious, fraudulent and a forgery. For clarity, counsel for the Defendant has invited the court to take cognizance of the Indenture issued in favor of the Defendant and a copy of which was duly certified by the Registrar on July 5, 2022.



36. In view of the foregoing, counsel for the Defendant has submitted that the Plaintiff has neither established nor proved any *prima facie* case, to warrant the grant of the orders sought.
37. The second issue raised by counsel for the Defendant relates to the fact that though the Plaintiff procured and obtained orders for the maintenance of status quo, which were issued on September 2, 2022, the said orders were never served within the stipulated timeline.
38. Besides, counsel for the Defendant has contended that to the extent that the orders procured and obtained by the Plaintiff were not served within the stipulated timeline, same therefore lapsed and ceased to have the force of law.
39. Notwithstanding the foregoing, counsel for the Defendant has similarly submitted that by the time the impugned orders issued on September 2, 2022 were being served, the Defendant herein had procured and obtained interim orders of injunction which were issued on September 12, 2022 vide ELC Case No E287 of 2022.
40. In the premises, counsel for the Defendant has submitted that the actions and activities that are complained against, were carried out and undertaken on the basis of lawful and legitimate orders of the court.
41. In a nutshell, counsel for the Defendant has therefore submitted that the Defendant herein is not guilty of contempt of any court order, either as stated by the Plaintiff or at all.
42. Thirdly, counsel for the Defendant has submitted that the instant suit is bad for duplicity and contravenes the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
43. Essentially, counsel for the Defendant has invited the court to find and hold that the instant suit is therefore barred by the doctrine of *sub-judice* and hence ought to be struck out.

Issues For Determination

44. Having reviewed the Applications dated August 31, 2022, September 23, 2022 and September 26, 2022 and having similarly considered the written submissions filed by and on behalf of the Parties, the following issues do arise and are thus germane for determination;
 - i. Whether the Plaintiff herein has established the existence of a *Prima facie* case pertaining to and concerning the suit property?
 - ii. Whether the Defendant is guilty of willful Disobedience and contempt of the orders of *status quo* issued on September 2, 2022?
 - iii. Whether the instant suit ought to be struck out on account on duplicity and for being *sub-judice*?

Analysis And Determination

Issue Number 1

Whether the Plaintiff herein has established the existence of a *Prima facie* case pertaining to and concerning the suit property.

45. The Plaintiff has contended that the suit property was sold to one Ernest Njenga Kiruku and himself, by one namely, Joel Ndungu Jeremiah, now deceased.



46. Similarly, the Plaintiff has stated that upon the sale of the suit property, the vendor thereafter executed an Indenture dated July 12, 1993 and which Indenture was subsequently presented for Registration and was duly registered at the land registry on July 16, 1993.
47. Premised on the foregoing, the Plaintiff has therefore contended that same is the lawful and legitimate proprietor over and in respect of the suit property. In this regard, the Plaintiff has therefore invoked and relied on the provisions of Sections 24 and 25 of the [Land Registration Act](#) 2012.
48. Additionally, the Plaintiff has further contended that by virtue of being the lawful and legitimate proprietor of the suit property, same is therefore entitled to exclusive possession and occupation thereof.
49. Consequently and in the premises, it is the Plaintiff's position that same has laid before the Honourable court credible evidence and/or basis to warrant the orders of Temporary injunction.
50. Contrarily, the Defendant has submitted that the Indenture which has been relied upon by the Plaintiff to mount and anchor the instant suit, is fictitious, fraudulent and a forgery.
51. On the other hand, the Defendant has added that the suit property lawfully belongs to and is registered in his name. In this regard, the Defendant has exhibited a copy of an Indenture dated July 12, 1993 and duly registered at the land registry on July 16, 1993.
52. Suffice it to point out that the Indenture which has been exhibited by the Defendant shows on the face thereof that same was certified by the Land Registrar on July 5, 2022. For clarity, the Certificate at the foot thereof shows that same was certified by a Land Registrar namely C K Ng'etich, bearing Authority Number 212.
53. From the foregoing exposition, it is apparent and evident that both the Plaintiff and the Defendant are holding Indentures, relating to the same property.
54. Similarly, it is also apparent that the two sets of Indentures are said to have been executed on the same date and were thereafter lodged for registration on even date.
55. Worryingly, it is also common ground that the vendor, who is alleged to have sold to the Plaintiff, is the same person who is stated to have sold the suit property to the Defendant.
56. In the premises, there is a serious controversy as pertains to which Indenture is lawful and legitimate. Consequently, it is appropriate to state that the issue as to which Indenture is legitimate is one that would require proper investigation and interrogation as pertains the process and the documentation that were relied upon to procure the ultimate Certificate of Title/Indenture.
57. Suffice it to point out that at this juncture, this court is not called upon to make precipitate and conclusive findings on the issues of evidence. For clarity, such conclusive findings fall within the preserve of the trial court and not otherwise.
58. Be that as it may, the obtaining circumstances brings to the fore a very sad situation but which has attained notoriety in the various Land Registries, in the Republic of Kenya.
59. For coherence, it is not unusual to see two parties tussling over ownership of the same property and each brandishing a Certificate of Title, allegedly procured from and issued by our Land Registries.
60. It is a sad situation that would require to be addressed. However, one can only live and hope that one day, the kind of situation that is reflected vide the instant suit will be consigned into the annals of history.



61. Be that as it may, looking at the totality of the evidence put before the court, it is difficult to authenticate and or ascertain whether the suit property belonged to the Plaintiff or otherwise.
62. To the extent that there are two contradictory Indentures/Certificate of Title, it is not possible to find and hold that the Plaintiff has established and proved a *prima facie* case. Atleast, not for now.
63. Suffice it to point out that a *prima facie* case would denote the existence of overwhelming evidence with a probability of success. However, in this respect, no such evidence has been tendered, supplied or availed.
64. Consequently, I come to the conclusion that the Plaintiff has not established a *prima facie* case with overwhelming chances of success.
65. To this end, it is imperative to recall and reiterate the holding of the Court of Appeal vide the case of *Mrao Ltd v First American Bank Ltd* (2003) eKLR, where the Honourable Court fashioned a definition for “*prima facie* case” in civil cases in the following words:

“In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

66. Additionally, the definition of what constitutes a *prima facie* case was revisited in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court observed as hereunder;

“*Prima facie*” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of *prima facie* case. The leading English House of Lords case of the *American Cyanamid Co Ethicon Ltd* [1975] AC 396 is a case in point. The meaning of “*prima facie* case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of *prima facie* case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in *Ramanlal Trambaklal Hatt V Republic* [1957] E.A. 332.

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima*



facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

67. In a nutshell, it is my finding and holding that the Plaintiff has neither proved nor established the existence of a *prima facie* case with overwhelming chances of success.

Issue Number 2

Whether the Defendant is guilty of willful disobedience and contempt of the orders of *status quo* issued on September 2, 2022.

68. It is common ground that the Plaintiff indeed filed and lodged an Application dated August 31, 2022 and which Application was filed under a Certificate of Urgency.

69. Similarly, there is no gainsaying that upon the filing of the named Application, same was duly placed before the Judge, who proceeded to and certified the Application as urgent.

70. Besides, it is appropriate to observe that upon the Application being certified as urgent, the judge proceeded to and issued interim orders of *status quo*, whereby the Judge clarified that the *status quo* shall relate to the current occupation, possession and use of the suit property.

71. Nevertheless, it is also imperative to state that while granting the orders of *status quo*, the court directed that the said orders and the Application in question were to be served upon the Defendant within 7 days from the date of issuance. For clarity, the orders having been issued on September 2, 2022, same ought to have been served on or before September 9, 2022.

72. Be that as it may, it is evident that the said orders were never served within the stipulated 7-day period. However, the impugned orders were only served on September 12, 2022 at 3:37 pm.

73. On the other hand, evidence has been placed before the court that prior to and before the orders herein were served, the Defendant had himself filed another suit namely, ELC Case No E287 of 2022, touching on and concerning the same Suit Property.

74. Besides, it is also apparent that upon the filing of the said suit, namely ELC E287 of 2022, the Defendant proceeded to and procured an order of interim injunction, pertaining to and concerning the same Property.

75. Be that as it may, it is appropriate to state that ELC E287 of 2022 was placed before a different Judge, who considered same and proceeded to issue/grant an interim order of injunction, on terms, which were named therein.

76. Based on the foregoing status, the Defendant proceeded to actualize the terms of the orders of interim injunction which were granted at the foot of ELC E287 of 2022.

77. Suffice it to point out that the impugned activities by and at the instance of the Defendant, are now the subject of the instant Application which seeks to have the Defendant cited and punished for contempt.

78. Consequently and in the premises, the question that does arise is whether the impugned actions can in the circumstances constitute willful disobedience and contempt of court?

79. I must point out that both the Plaintiff and the Defendant were engaged in a game of (sic) wits and tactics of stealing a match against each other.



80. Premised on the foregoing, the impugned actions and activities by the Defendant appear to have been carried out and undertaken on the basis of lawful court orders, which were issued by Hon Justice Wabwoto, on September 12, 2022.
81. In my considered view and taking into account the conflicting set of orders that were issued vide the separate/parallel suit, it is difficult nay impossible to find and hold that the impugned actions by the Defendant, constituted and amounted to willful disobedience of lawful court orders.
82. Instructively, the Defendant has contended that same acted in accordance with the terms and tenor of the orders of interim injunction, which were issued vide ELC No E287 of 2022.
83. In the premises and given the obtaining circumstances, I am afraid that the Plaintiff herein has not met or satisfied the requisite standard for proving a claim for willful disobedience/contempt of court.
84. It must be remembered that a person accused of contempt/willful disobedience of lawful court orders may be committed to jail/imprisoned. In this regard, such a person may very likely be denied or deprived of his liberty.
85. Given the gravity of a charge of contempt/willful disobedience, it is incumbent upon the claimant to therefore lay before the court cogent, credible and sufficient evidence to warrant a finding of contempt.
86. Unfortunately, in respect of the subject matter, the Plaintiff has not met the requisite threshold. Consequently, the charge/accusation of contempt has not been duly proved/established, to the satisfaction of the Court.
87. To vindicate the observation that a charge of contempt/willful disobedience of lawful court orders must be sufficiently established and proved, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Mututika v Baharini Farm Co Ltd* (1985) eKLR, where the court stated as hereunder;

In, *Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, *ipso facto*, not a criminal offence properly so defined.

We agree with Mr Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof.

The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved “with such strictness of proof ... as is consistent with the gravity of the charge ...”

88. Simply put, the actions that are complained against and which form the basis of the contempt Application, appear to be premised and predicated on lawful court orders issued on September 12, 2022 vide a separate/parallel suit.



89. In this regard, it would be the height of injustice for this court to cite and punish the Defendant for actions which *ipso facto* appear to be anchored on lawful orders issued by another court of concurrent jurisdiction.

Issue Number 3

Whether the instant suit ought to be struck out on account of duplicity and for being *sub-judice*.

90. In respect of the issue herein, it is imperative to note and observe that indeed ELC Case No E287 of 2022, which founds the basis of the instant Application was filed later or after the instant suit.
91. Consequently, if there is a suit that would be barred and prohibited by dint of the provisions of Section 6, then it is the suit that was filed subsequently and not otherwise.
92. To this end, it is imperative to take note of the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya.
93. For convenience, same are reproduced as hereunder;

6. Stay of suit

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. Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

94. On the other hand, it is important to take cognizance of the holding of the Supreme Court in the case of [Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 Others](#) (2020) eKLR, where the Supreme Court of Kenya observed as hereunder;

(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.

95. From the foregoing exposition of the law, what is apparent and evident is that the doctrine of *Sub-judice* operates to bar and prohibit the prosecution of a subsequent suit, during the pendency of an earlier suit filed between the same parties or touching on the same subject matter.



96. In the premises, a person who files the subsequent suit cannot now be heard to invoke and rely on the doctrine of *res sub-judice* to either stay or suspend proceedings being taken in the earlier suit.
97. Notwithstanding the foregoing, it is also appropriate to underscore that the doctrine of *Res sub-judice* cannot by itself be relied upon for purposes of striking out a suit, either in the manner impleaded or at all.
98. For coherence, the import and tenor of the provisions of Section 6 is that the subsequent suit shall be stayed and not struck out.
99. In a nutshell, I come to the conclusion that the Application dated September 26, 2022 which seeks to have the instant suit struck out on the basis of duplicity and on account of *sub-judice*, is misconceived, mischievous and legally untenable.

Final Disposition:

100. Having analyzed and evaluated the various issues that were highlighted in the body of the Ruling, it must have become apparent that the three named Applications are devoid and bereft of merits.
101. Nevertheless, it is appropriate to point out that both the Plaintiff and the Defendant are laying a claim to ownership of the suit property. In this regard, even though I have found and held that the Plaintiff did not establish a *prima facie* case with overwhelming chances of success, there is still need to preserve the suit property pending hearing and determination of the suit.
102. In any event, it is an established and hackneyed principle of the law that where there is controversy pertaining to ownership of a suit property, it behooves the court to preserve the suit property and avert alienation, wastage and disposal of same during the pendency of the suit.
103. To this end, I cite the holding in the case of *Virginia Edith Wambui Vs Joash Ochieng Ougo*, Civil Appeal No 3 of 1987 (1987) eKLR, where the Court of Appeal held that: -

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the *status quo* until the dispute has been decided on a trial.”
104. Consequently and in the premises, I am obliged to and Do hereby make the following Orders:
 - i. The Application dated August 31, 2022 be and is hereby Dismissed.
 - ii. The Application dated September 23, 2022 be and is hereby Dismissed.
 - iii. The Application dated September 26, 2022 be and is hereby Dismissed.
 - iv. Each Party shall bear own costs.
 - v. Nevertheless, there be and is hereby granted an order for Maintenance of the *status quo* pertaining to and concerning the suit property and in particular L R No 36/VII/413, pending the hearing and determination of the subject suit.
 - vi. For the avoidance of doubt, the *status quo* over and in respect of the suit property shall relate to the current status and in particular, neither the Plaintiff nor the Defendant shall carry out or undertake any excavation, construction and or development on the suit property, in any manner whatsoever and howsoever.
105. It is so Ordered.



CONCLUSIONS

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2022.

HON JUSTICE OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr Okoyo for the Plaintiff.

Mr Mohammed h/b for Abdiaziz for the Defendant.

