



**Wanjohi v Kuria & 5 others; Chief Land Registrar (Interested Party) (Environment & Land Case E287 of 2022) [2022] KEELC 15582 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15582 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E287 OF 2022**

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

**BETWEEN**

**JOSEPH KINGORI WANJOHI ..... PLAINTIFF**

**AND**

**MICHAEL MBUGUA KURIA ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE OGUTU OLUOCH ..... 2<sup>ND</sup> DEFENDANT**

**JOHN OCHIENG OTIENO ..... 3<sup>RD</sup> DEFENDANT**

**VINCENT OMOLO RIAKO ..... 4<sup>TH</sup> DEFENDANT**

**CHARLES WANJOHI ..... 5<sup>TH</sup> DEFENDANT**

**CHARLES KAMAU ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

1. The ruling herein relates to three separate and distinct applications. For clarity, the applications are dated September 9, 2022, September 16, 2022 and September 20, 2022, respectively.
2. Vide the application dated the September 9, 2022, the Plaintiff has sought for the following reliefs:
  - i. That this application be and is hereby certified as urgent and service thereof be dispensed with in the first instance.
  - ii. That pending the hearing and determination of this Application inter parties, the Honourable court be pleased to grant an interim order restraining the Defendants/Respondents by themselves, their agents, servants, workmen or



anyone acting on their instructions or interests from entering, remaining inside, trespassing, encroaching, alienating, disposing, disturbing or in any way interfering with the Applicant's quiet and peaceful enjoyment of his property known as land reference 36/VII/413 in Eastleigh, Nairobi.

- iii. That pending the hearing and determination of this suit, the Honourable court be pleased to grant an interim order restraining the Defendants/ Respondents by themselves, their agents, servants, workmen or anyone acting on their instructions or interests from entering, trespassing, encroaching, alienating, disposing, disturbing or in any way interfering with the Applicant's quiet and peaceful enjoyment of his property known as land reference 36/VII/413 in Eastleigh, Nairobi.
  - iv. That the Honourable court be pleased to order the OCS Eastleigh North Police Station do ensure compliance and enforcement of the orders for peace to prevail.
  - v. That the Honourable Court be pleased to issue such further orders it deems just and convenient in the circumstances of the case.
3. The subject Application is anchored and premised on the various grounds which have been enumerated in the body thereof and same is further supported by the Affidavit of Joseph King'ori Wanjohi sworn on even date.
  4. Despite the fact that the subject Application was duly served upon the Defendant/Respondent, none of the Respondents filed any responses thereto or at all.
  5. Nevertheless, it is appropriate to recall that the 1<sup>st</sup> Defendant herein had similarly filed a parallel suit vide ELC No E275 of 2022 and same had also filed an Application for temporary injunction relating to the same suit property.
  6. The second Application, namely the Application dated the 16<sup>th</sup> of September 2022, has been filed by the Defendant. For completeness, the said Application seeks for the following reliefs:
    - a. This Application be certified as urgent and be heard *ex-parte* in the first instance.
    - b. Pending the hearing of this Application *inter-partes*, this Honourable Court be pleased to issue an order to stay the *ex-parte* orders of September 12, 2022 by Hon EK Wabwotoj.
    - c. Pending the hearing and determination of this Application *inter-partes*, this Honourable court do issue an order maintaining the status quo ante as at September 12, 2022.
    - d. This Honourable Court be pleased to issue an order to vacate or set aside its *ex-parte* orders September 12, 2022.
    - e. This Honourable court be pleased to issue an order striking out the Plaintiff's Application dated September 9, 2022 and the main suit (plaint) with costs to the Defendant/Applicant.



- f. This Court issues any further orders that it may deem in the best interest of justice and fairness.
7. Suffice it to point out that the instant Application is anchored on the various grounds contained and reflected at the foot thereof and similarly, same is supported by the Affidavit of the 1<sup>st</sup> Defendant sworn on even date.
8. Upon being served with the Application dated the September 16, 2022, the Plaintiff filed a Replying Affidavit sworn on the September 21, 2022.
9. Vide the Application dated the September 20, 2022, the Defendant (though the application is said to have been filed on behalf of 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 an order to stay the ex-parte orders of September 12, 2022 by Hon EK Wabwoto, J, and the OCS Pangani Police station to ensure/supervise compliance with the court order.
  - iii. The Plaintiff 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.
  - iv. That the OCS Pumwani 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.
  - v. The Plaintiff 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.
  - vi. The costs of this Application be provided for.
10. Suffice it to state that the Application herein is predicated and premised on the grounds enumerated in the body thereof and same is supported by the Affidavit of the Applicant. However, it is appropriate to clarify that the Applicant who is stated to have sworn the Affidavit is neither disclosed nor identified in the body of the Application.
11. Be that as it may, though the Application was served, there is no evidence of response by the Plaintiff.
12. Notwithstanding the foregoing, it is appropriate to underscore that the Application herein is quite confusing insofar as same is indicated to have been filed on behalf of the Plaintiff and yet the reliefs thereunder are also sought against (sic) the said Plaintiff.
13. Suffice it to point out that the matter came up for mention for directions on the October 4, 2022, whereupon it was ordered and directed that all the Applications filed herein be canvassed and disposed of simultaneously.
14. On the other hand, it was further directed that the Applications herein be canvassed and disposed of by way of written submissions, to be filed and exchanged by the parties.



15. Pursuant to and in line with the foregoing directions, the Plaintiff filed written submissions dated the October 18, 2022, whereas the submissions on behalf of the Defendant were filed on the October 13, 2022. For clarity, both submissions are on record.

### **Submissions By The Parties**

#### **Submissions by the Plaintiff**

16. The Plaintiff filed written submissions dated the October 18, 2022 and in respect of which, same has identified, highlighted and amplified three issues for consideration.
17. First and foremost, counsel for the Plaintiff has submitted that the Plaintiff herein lawfully bought and purchased LR No 36/VII/413, hereinafter referred to as the suit property from one Joel Ndungu Jeremiah, now deceased.
18. It was further submitted that following the purchase of the suit property from the named vendor, an Indenture was duly executed and thereafter presented for registration at the relevant Land Registry at Nairobi. For clarity, counsel for the Plaintiff added that the Indenture was duly registered on the 16<sup>th</sup> of July 1993.
19. On the other hand, learned counsel for the Plaintiff submitted that having been duly registered as the proprietor and owner of the suit property, the Plaintiff herein is conferred with the requisite mandate to enter upon and use the entire of the suit property to the exclusion of all and sundry, the Defendant not excepted.
20. Premised on the forgoing, counsel for the Plaintiff has therefore submitted that the Plaintiff has thus established and proved a prima facie case with overwhelming chances of success.
21. Contrarily, counsel for the Plaintiff has submitted that the Indenture held by the Defendant herein and upon which the Defendant seeks to enter upon and take possession of the suit property, was fraudulently procured and obtained.
22. In short, counsel for the Plaintiff has contended that the 1<sup>st</sup> Defendant therefore has no lawful basis and or claim over and in respect of the suit property.
23. In respect of the foregoing submissions, counsel for the Plaintiff has cited, quoted and relied on the decision of *Giella v Casman Brown Ltd (1973) EA* and *Mrao Ltd v First American Bank Ltd (2003) eKLR*.
24. Secondly, counsel for the Plaintiff has submitted that by the time the current suit was filed and lodged before the court, the Plaintiff herein had not been served with any court process relating to and concerning ELC Case No E275 of 2022.
25. Further, counsel submitted that in fact upon the lodgment of the instant suit, the Judiciary case tracking system disseminated the information to all concerned parties and the information relating to the filing of the instant suit was duly disseminated on Monday, the 12<sup>th</sup> of September 2022 at 12:57 pm.
26. To the contrary, counsel for the Plaintiff has added that that the 1<sup>st</sup> Defendant herein only served or attempted to serve a copy of the order which had been issued vide ELC Case No E275 of 2022 on the 12<sup>th</sup> of September 2022, albeit at 5:12pm.
27. In the premises, counsel for the Plaintiff has submitted that by the time the Plaintiff filed and mounted the instant suit, the Plaintiff was not aware of or privy to the existence of any previous suit.



28. Based on the foregoing, counsel for the Plaintiff has submitted that it cannot therefore be lawfully contended that the instant suit was filed on the face of an existing suit, either as contended by the 1<sup>st</sup> Defendant or at all.
29. Thirdly, counsel for the Plaintiff has submitted that the Application seeking to cite and punish the Plaintiff for willful disobedience and contempt of lawful court orders, is premature, misconceived and legally untenable.
30. In any event, counsel for the Plaintiff has contended that the impugned activities, which are alleged to constitute and form the basis of the alleged contempt, were carried out and undertaken on the basis of lawful court orders issued on the 12<sup>th</sup> of September 2022.
31. In view of the foregoing, counsel for the Plaintiff has invited the Honourable court to find and hold that the Application for contempt is pre-mature, devoid of merits and thus ought to be dismissed.

### **Defendants Submissions**

32. Counsel for the Defendants filed written submissions dated the 13<sup>th</sup> of October 2022 and same has similarly raised and canvassed three issues for due consideration by the court.
33. Firstly, counsel for the 1<sup>st</sup> Defendant, has submitted that the 1<sup>st</sup> Defendant herein together with one Ernest Njenga Kiruku, bought, purchased and thereafter acquired the suit property from Joel Ndungu Jeremiah now deceased.
34. Further, counsel has added that having lawfully bought and purchased the suit property, the 1<sup>st</sup> Defendant herein together with the co-owner are the lawful and legitimate proprietors of the suit property.
35. In the premises, counsel for the 1<sup>st</sup> Defendant has therefore submitted that it is the 1<sup>st</sup> Defendant who has the lawful and legitimate mandate to enter upon, remain on and utilize the suit property.
36. Consequently and in the premises, counsel for the 1<sup>st</sup> Defendant has invited the Honourable court to find and hold that the Plaintiff herein has no lawful rights and interests over the suit property.
37. Secondly, counsel for the Defendants has also submitted that the Plaintiff herein was duly served with the orders of the court issued vide ELC Case No E275 of 2022, but despite having been duly served, same went ahead and evicted the 1<sup>st</sup> Defendant's tenants from the suit property.
38. Based on the foregoing, counsel has therefore invited the court to find and hold that the Plaintiff herein is guilty of contempt and willful disobedience of lawful court orders.
39. In view of the foregoing, counsel has therefore submitted that the Plaintiff ought to be cited and punished for contempt.
40. Thirdly, counsel for the 1<sup>st</sup> Defendant has submitted that the instant suit was filed during the existence of the previous suit namely, ELC Case No E275 of 2022.
41. According to counsel, the instant suit therefore offends and contravenes the provisions of section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
42. Consequently, counsel has invited the court to strike out the instant suit on account of duplicity and for being an abuse of the due process of the court.



## Issues For Determination

43. Having reviewed the named Applications, together with the Supporting Affidavit thereto and having duly considered the written submissions filed by and on behalf of the Parties herein, the following issues are pertinent and thus deserving of determination;
- i. Whether the Plaintiff has established or adduced evidence to prove the existence of a prima facie case with overwhelming chances of success?
  - ii. Whether the Plaintiff is guilty of willful disobedience and contempt of lawful court orders?
  - iii. Whether the instant suit is bad for duplicity and ought to be struck out?
  - iv. Alternatively, whether the instant suit offends the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and if so whether same ought to be stayed?

## Analysis and Determination

### **Whether the Plaintiff has established or adduced evidence to prove the existence of a Prima facie case with overwhelming chances of success.**

44. Before venturing to address and ascertain whether the Plaintiff has tendered and adduced sufficient basis to prove the existence of a prima facie case, it is appropriate to discern and understand the meaning of the word ‘prima facie case.’
45. In this regard, it is appropriate to take cognizance of the definition of a prima facie case as supplied vide the holding in the case of *Mrao Ltd v First American Bank Ltd* (2002) eKLR, where the Court of Appeal stated and observed as hereunder:
- “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.”
46. Additionally, the meaning and tenor of what constitutes a *prima facie* case was revisited by the Court of Appeal in the case of *Nguruman v Jan Bonde Nielsen* (2014) eKLR, where the Court of Appeal 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] EA 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.”

47. Having duly ascertained the import, tenor and meaning of what constitutes a *prima facie* case, it is now appropriate to venture and ascertain whether the Plaintiff has proved the existence of a *prima facie* case.
48. To this end, it is appropriate to recall that the Plaintiff contended that same bought and purchased the suit property from one Joel Ndungu Jeremiah, now deceased.
49. On the other hand, the Plaintiff added that upon the purchase of the suit property from the named vendor, an Indenture of conveyance was duly prepared and executed, whereby the vendor transferred his interests over and in respect of the suit property onto the Plaintiff.
50. In the premises, the Plaintiff has contended that same is therefore the lawful and legitimate proprietor of the suit property and thus entitled to an order of injunction.
51. Notwithstanding the foregoing, it is not lost on this court that the 1<sup>st</sup> Defendant has also contended that same bought and purchased the suit property from the same vendor and an Indenture of conveyance was duly prepared and executed.
52. Similarly, the 1<sup>st</sup> Defendant has also added that upon the preparation and execution of the Indenture, same was presented for registration at the Land Registry and was ultimately registered on the 16<sup>th</sup> of July 1993.
53. In the premises, the 1<sup>st</sup> Defendant herein has also raised a claim pertaining to ownership of the suit property.
54. From the foregoing, it is evident and apparent that both the Plaintiff and the 1<sup>st</sup> Defendant are all laying a claim to ownership and Title of the suit property.
55. In any event, it is also common ground that both the Plaintiff and the 1<sup>st</sup> Defendant have all exhibited a copy of an Indenture of conveyance showing that each is duly registered as the owner of the suit property.
56. For coherence, what comes out from the totality of the evidence placed before the court is that there appears to be two conflicting Indentures of conveyance over and in respect of the suit property.
57. In the premises, it would be difficult for the court, at this juncture, to ascertain or authenticate which of the conflicting Indentures of conveyance is the legitimate or lawful indenture.



58. Suffice it to point out that the determination of which of the two Indentures is lawful and legitimate will require adduction of evidence during the plenary hearing and not otherwise.
59. Nevertheless, I must point out that where there is a serious controversy pertaining to ownership of a disputed property, the court is not called upon to make any precipitate findings on the issues of evidence or otherwise.
60. Be that as it may, the court is still enjoined to evaluate and calibrate on the facts presented and to see whether on the basis of the facts presented, there is a scintilla of a *prima facie* case that has been established or proven.
61. In this regard, it is appropriate to take cognizance of the decision in the case of *Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others* [2018] eKLR, where the court stated and observed as hereunder:

23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As Lord Diplock warned in *American Cyanamid Co (No 1) vs Ethicon Ltd* [1975] UKHL 1 “it is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” This Court expressed a similar view in *Mbutia vs Jimba Credit Finance Corporation & another* [1988] KLR 1 where it was held that “the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”

62. Guided by the foregoing decision and coupled with the existence of two parallel and conflicting Indentures of conveyance, I find and hold that it is not possible to determine the existence of a *prima facie* case with overwhelming chances of success.
63. In a nutshell, it is my finding and holding that the Plaintiff has not been able to establish and prove that same has a *prima facie* case with overwhelming chances of success.
64. In the premises, having failed to established the existence of a *prima facie* case, it is therefore evident that the Application for temporary injunction cannot be granted, either as prayed or at all.
65. To this end, I beg to reiterate and reproduce the observation of the Court of Appeal in the case of *Nguruma Ltd Jan Bonde Nielsen & 2 others* (2014) eKLR, where the Honourable court stated and observed as hereunder:

“If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.”



**Whether the Plaintiff is guilty of willful Disobedience and contempt of lawful court orders.**

66. The counsel for the 1<sup>st</sup> Defendant filed and lodged an Application dated the 20<sup>th</sup> of September 2022 and same has sought to have the Plaintiff cited and punished for contempt of lawful court orders.
67. Nevertheless, before venturing to consider the merits of the Application dated the 20<sup>th</sup> of September 2022, there are certain preliminary issues which merit deliberation.
68. First and foremost, it is evident and apparent that the Application dated the 20<sup>th</sup> of September 2022 is stated to have been drawn and filed on behalf of the Plaintiff/Applicant.
69. Additionally, it is also stated on the face of the reliefs sought that the impugned Application is seeking to have the Plaintiff cited and punished for contempt.
70. To my mind, the Application is curious and interesting. Surely, can an advocate allegedly instructed by the Plaintiff seek to have his own client (read, the same Plaintiff) cited and punished for contempt?
71. In my humble and considered view, the Application dated the 20<sup>th</sup> of September 2022, which seeks the citation and punishment of the Plaintiff is ipso facto bad in law and constitutes an abuse of the due process of the court.
72. The second preliminary issue that merits deliberation, relates to whether the firm of M/s Odinga Oboge & company Advocates have been duly instructed and retained to act for the Plaintiff in the instant suit.
73. It is not lost on the court that the instant suit has been filed on behalf of the Plaintiff by the firm of M/s Abdiaziz & Company Advocates. For clarity, the firm of M/s Odinga Oboge & Co Advocates are the ones who filed the sister suit, namely, ELC Case No 275 of 2022 on behalf of the Plaintiff therein.
74. As concerns the instant suit, the law firm of M/s Odinga Oboge & Company Advocates are not on record for the Plaintiff, either as stipulated at the foot of the impugned Application or at all. For clarity, the client of the said Lawfirm is the 1<sup>st</sup> Defendant herein.
75. In the premises, it is obvious and evident that the impugned Application has been filed by a law firm, who are not lawfully representing the Plaintiff.
76. Essentially, there is no gainsaying that the impugned Application is therefore premature and misconceived and otherwise legally untenable.
77. Having addressed and dealt with the two named preliminary issues, it is now appropriate to return to and reconsider the merits of the impugned Application.
78. To this end, I beg to point out that there is no order which was issued against the Plaintiff/Applicant, which is capable of being disobeyed or otherwise, to warrant the citation and punishment of the Plaintiff/Applicant.
79. For completeness, the only order which was issued in respect of the subject matter was the order of interim injunction issued on the 12<sup>th</sup> of September 2022 and which order was issued in favor of the Plaintiff/Applicant.
80. In my understanding, the Plaintiff/Applicant having procured and obtained the interim orders of injunction, same cannot now be the subject of an Application for citation and punishment on the basis of orders which were issued in his favor.



81. Contrarily, there are no orders which were issued in favor of the 1<sup>st</sup> Defendant in respect of the subject matter, which are capable of anchoring and founding the instant Application for contempt/disobedience of lawful court orders.
82. In a nutshell, I come to the conclusion that the entire Application dated the 20<sup>th</sup> of September 2022, is bad in law and otherwise amounts to an abuse of the due process of the court.
83. In short, there is no evidence that the Plaintiff is guilty of willful disobedience/contempt of lawful court orders, or at all, issued against the same.

**Whether the instant suit is bad for Duplicity and ought to be struck out?**

**Alternatively, whether the instant suit offends the provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya and if so whether same ought to be stayed?**

84. As pertains to the issues herein, it is appropriate to state and underscore that there are two suits touching on and concerning the same property.
85. Suffice it to note that the 1<sup>st</sup> Defendant herein had previously filed and lodged proceedings vide ELC Case No E275 of 2022 against the current Plaintiff herein. For clarity, the said suit remains alive and in existence.
86. On the other hand, the current Plaintiff has also filed the instant suit and same touches on and concerns the same property.
87. Premised on the foregoing, there is no gainsaying that the two suits touch on and concern the same property as well as the same parties.
88. Arising from the foregoing, the Defendant herein has therefore implored the court to proceed and strike out the instant suit on the basis of duplicity and for contravening the doctrine of Res sub-judice.
89. Nevertheless, what I wish to state is that the doctrine of *res sub-judice* and in particular the provisions of section 6 of the Civil procedure Act, Chapter 21 Laws of Kenya, does not state that where there is a subsequent suit, that suit ought to be struck out.
90. To my mind, whereas the doctrine of *res sub-judice* frowns upon and deprecates upon the filing of subsequent suits touching on the same matter and between the same parties, same however underlines the position that where there exists a subsequent suit, same ought to be stayed and not struck out.
91. In any event, the import, tenor and scope of the doctrine of *res sub-judice* was duly considered, analyzed and elaborated upon by 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 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.

92. Consequently and in my considered view, it is apparent that the doctrine of *res sub-judice* cannot therefore be relied upon to strike out a suit, either in the manner contended by the 1<sup>st</sup> Defendant or at all.
93. Other than the foregoing, the second aspect that merits consideration is whether the two suits herein ought to be allowed to proceed simultaneously.
94. Without belaboring the point, I wish to underscore that where there are two or more suits touching on the same property and involving the same parties, it is trite and established that the subsequent suit ought to be stayed and held in suspense, pending the hearing and eventual determination of the first suit.
95. To this end, the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya are apt, relevant and instructive.
96. For convenience, Section 6 of the [Civil procedure Act](#), 21 Laws of Kenya is 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.

97. Based on the import and tenor of the provisions which have been reproduced in the preceding paragraph, it would be inappropriate and injudicious to allow both suits to proceed simultaneously.
98. In the premises, it would be in the interests of justice and economical usage of the precious judicial time, to either have the two suits consolidated or otherwise the latter suit be stayed.
99. Be that as it may, it is common knowledge that the court can only grant an order which has been sought at the foot of the said Application.
100. Consequently, where there is no Application for consolidation, this Honourable court cannot proceed and decree consolidation of the two suits.
101. Conversely, the court is enjoined and at liberty to decree that the subsequent suit, namely, ELC Case No 287 of 2022, be stayed pending the hearing and eventual determination of this suit.
102. In a nutshell, it is my finding and holding that the Application to strike out the instant suit on the basis of duplicity is premature and misconceived. On the other hand, it is my finding and holding that the two suits, namely, ELC E275 of 2022 and ELC E287 of 2022, cannot proceed simultaneously. For clarity, the latter ought to be stopped.



**Final Disposition:**

103. In the course of deliberating upon the issues that were highlighted in the body of the Ruling, it must have become evident and apparent that the three Applications filed herewith, are entirely misconcieved and legally untenable.
104. Be that as it may, I am alive to the fact that the dispute pertaining to and in respect of the suit property, will require to be addressed and adjudicated upon during the plenary hearing.
105. Consequently and in view of the foregoing, there is need to protect and preserve the suit property and ensure that same is neither alienated, disposed of or otherwise interfered with during the pendency of the proceedings.
106. However and for the avoidance of doubt, I must point out that the court has since decreed and issued an order for maintenance of status quo over and in respect of the suit property vide ELC Case No E275 of 2022.
107. In the premises, there is no need to issue similar orders in respect of the subject suit. For clarity, the status quo of the suit property is well procured and duly fortified vide the orders for the maintenance of *status quo*, issued vide the sister suit.
108. Consequently, and in the premises, the orders that merits being issued in respect of the subject matter are as hereunder:
- i. The application dated the September 9, 2022 be and is hereby dismissed.
  - ii. The application dated the September 16, 2022 be and is hereby dismissed.
  - iii. The application dated the September 20, 2022 be and is hereby struck out.
  - iv. Each part to bear own costs.
  - v. In the interests of justice and to evert issuance of conflicting orders, the suit herein be and is hereby stayed pending the hearing and determination of ELC Case No E275 of 2022.
109. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER 2022.**

**HON. JUSTICE OGUTTU MBOYA,**

**JUDGE.**

**In the Presence of;**

Benson - Court Assistant.

Mr Mohammed h/b Abdiaziz for the Plaintiff.

Mr Okoyo for the Defendants.

