



**Kimitei v Sawe (Environment and Land Appeal E004 of 2022)
[2022] KEELC 14715 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E004 OF 2022
EO OBAGA, J
NOVEMBER 10, 2022**

BETWEEN

JOSEPHAT KOSGEI KIMITEI APPELLANT

AND

PATRICIA SAWE RESPONDENT

(Being an appeal against the ruling of Hon. D. Mikoyan Chief Magistrate dated 17th February, 2022 in Eldoret C.M ELC No E018 of 2020 between Joseph Kosgei Kimitei –Vs- Patricia Sawe)

JUDGMENT

1. The appellant is son of Kimitei Samoei who contends that his father purchased 100 acres from Daudi Cheptum Sawe who is the registered owner of LR No 10520. The appellant states that as son of Kimitei Samoei, he was given 10 acres out of the portion purchased by his father.
2. Daudi Cheptum Sawe has since passed on and his estate is subject to a succession cause before Eldoret High Court in Succession Cause No 63 of 2002. The deceased Daudi Cheptum Sawe is father to the respondent.
3. Sometime in or around April 20, 2020, the respondent trespassed into a portion held by the appellant and sprayed his maize crops with chemicals which totally destroyed the same. The appellant then moved to Eldoret Chief Magistrate's court where he filed a suit against the respondent in which he sought compensation for the crops which had been destroyed by the respondent.
4. The appellant contemporaneously filed a notice of motion in ELdoret CM ELC No E018 of 2020 in which he sought orders of injunction against the respondent. Before the applicant's notice of motion dated September 21, 2020 could be heard, the respondent field a notice of preliminary objection in which she contended that the court had no jurisdiction to hear the application as the suit was touching on property which formed part of the deceased's estate whose proceedings were pending before the High Court.



5. The trial magistrate heard the preliminary objection which he upheld on grounds that the suit was sub judice and proceeded to strike out the entire suit with costs to the respondent. This is what triggered this appeal in which the appellant has raised the following grounds of appeal: -
 1. That the trial magistrate erred in law and fact by dismissing the suit instead of staying it as per the provisions of section 6 of the *Civil Procedure Act*.
 2. That the trial magistrate erred in law and fact by failure to consider that the appellant was seeking for special damages for malicious damage to his crops on the suit land and not a dispute of ownership of land.
 3. That the trial magistrate erred in law and fact by failure to observe that a court sitting on succession cause does not have jurisdiction on dispute of ownership to land by third parties.
 4. That the trial magistrate erred in law and fact by failure in considering the evidence and submissions by the appellant.
 5. That the trial magistrate erred in law and fact generally hence arriving a wrong decision.
6. The parties to this appeal were directed to file written submissions. The appellant filed his submissions on August 31, 2022. The respondent filed her submissions on September 16, 2022. As a first appellate court, my duty is to evaluate the trial court's record to determine whether the trial court arrived at a correct finding. See *Selle and Another v Associated Motor Boat Co Limited & others (1968) EA 123*.
7. I have considered the record of the trial court as well as the grounds of appeal. There is only one issue for determination and this is whether the suit which was struck out was subjudice. The principle of subjudice is predicated on 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.”
8. There is no contention that there are ongoing proceedings in succession cause No 63 of 2002 regarding the estate of Daudi Cheptum Sawe. There is also no contention that the proceedings in that cause relates to distribution of among other properties LR No 10520 which is registered in the name of the deceased. The appellant herein is one of the third parties in that cause. The respondent is one of the beneficiaries of the estate of the deceased.
9. The appellant's claim in the suit which was struck out was for compensation as a result of the maize which was destroyed by the respondent. According to the records in the lower court, there is atleast a copy of a sale agreement between the deceased and the appellant's father in respect of purchase of 20 acres. The appellant's father may have made further purchase to make it 100 acres which is the subject of the claim by the third parties in the succession suit.
10. As is clear and as was rightly observed by Justice Musyoka in *Re Estate of Alice Mumbua Mutua (Deceased) (2017) eKLR*, a succession court has no jurisdiction on claims by third parties. A succession court only deals with distribution of property of a deceased person.
11. In the suit which was struck out, the appellant was seeking to be compensated as a result of the destruction of his maize crops by the respondent. That is a matter which was clearly within the



jurisdiction of the trial court. In *Republic v Registrar of Societies Kenya & 2 others ex parte Moses Kirima & 2 others (2017) eKLR*, it was held as follows:-

“...therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed....”.

12. In the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (interested parties) (2020) eKLR*, the Supreme Court of Kenya stated as follows:-

“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 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.

13. It is clear from the cases cited hereinabove and section 6 of the *Civil Procedure Act* that for a suit to be subjudice, the court before which the earlier suit is filed must have jurisdiction to grant the relief claimed in the latter suit. The High Court before which the earlier suit was filed has no jurisdiction to grant the relief which was being claimed by the appellant. The suit which was struck out was not therefore sub judice. The trial magistrate was therefore wrong to have made a finding that the suit was subjudice. I find that the appellant’s appeal has merit. I allow the same and proceed to set aside the order of the trial magistrate striking out the appellants suit and in place thereof make an order reinstating the struck out suit. The reinstated suit is remitted back to the Chief Magistrate’s court for hearing before a magistrate other than Hon Dennis Mikoyan.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF NOVEMBER, 2022.

E O OBAGA

JUDGE

In the virtual presence of;

Mr Mengich for the appellant.

Ms Korir for Mr. Oduor for respondent.

Court Assistant –Albert

E O OBAGA

JUDGE



10TH NOVEMBER, 2022

