



Bamato Distributors Limited v Mohamedali (Environment & Land Case E003 of 2022) [2022] KEELC 15456 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E003 OF 2022
LL NAIKUNI, J
DECEMBER 9, 2022**

BETWEEN

BAMATO DISTRIBUTORS LIMITED PLAINTIFF

AND

NAJMUDIN NOORALI MOHAMEDALI DEFENDANT

RULING

I. Introduction

1. The Defendant/Objector herein moved this Honorable Court by raising an objection through filing a Notice of Preliminary Objection dated May 19, 2022. The Defendant/Objector herein sought for the dismissal of the entire suit herein. In so doing, the Defendant raised the following three (3) main grounds of objection. These were: -
 - a. That this suit is “*Sub – Judice*” on account of Mombasa High Court Civil Suit No. 93 of 2021 which was filed first in time.
 - b. That Mombasa High Court Civil Suit No. 93 of 2021 challenges the manner in which the Plaintiff acquired ownership of the suit property, the Plaintiff cannot therefore initiate eviction proceedings while the said suit is still pending.
 - c. That the Court has no jurisdiction to hear and determine the suit on account of ground (1) above.

II. Submissions

2. On May 9, 2022, when this matter came up for directions, the parties were guided by Honorable Court whereby they agreed to have the said Preliminary objection be canvassed by way of written submissions. Pursuant to that, directions and strict timelines were given by the Court to that effect. Indeed, while



the Defendant/Objector complied by filing his written submissions by the time the court retired to write this ruling, the Plaintiff failed to do so. None of it by the Plaintiff is on record.

A. The Written Submissions by the Defendant/Objector.

3. On July 8, 2022, the Learned Counsel for the Defendant/Objector the Law firm of Messrs. Opwapo & Co. Advocates filed their written submissions dated July 6, 2022. Mr. Opwapo Advocate submitted that before embarking on our rejoinder to the aforesaid grounds it is in the interest of justice to ascertain whether or not the Notice of Preliminary Objection as filed herein meets the threshold set by the law to govern Preliminary Objections.

4. The Learned Counsel submitted that the same was explained well in the case of “*Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors ltd* (1969) EA 696 where Lord Charles Newbold P. observed as follows:

“A proper preliminary objection constitutes pure points of law”

5. The Judge continued to hold as follows:

“..... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the other side are correct. It cannot be raised if any fact has 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 nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

6. The Learned Counsel submitted that the foregoing is coupled with the decision made in “*Attorney General & Another vs Andrew Maura Gitinji & Another* (2016) eKLR where the scope, nature and meaning of a Preliminary Objection was given as follows:

- i. A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by the other side are correct.
- ii. A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of Preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.”

7. The Learned Counsel submitted that the Court’s ruling dated March 2, 2022 in “*Ess Pee Investment – Versus - Deegisat Servces Limited* [2022] eKLR, the Court observed in paragraph 17 that:

“The application is longer pending and can not be used to successfully invoke the doctrine of *sub judice*. Furthermore, a preliminary objection ought to be on a pure point of law, argued on the presumption that all facts pleaded by either side are corrected. A preliminary objection cannot be raised and sustained if any fact has to be ascertained. Whenever court retires to ascertain facts, as it has done in this scenario, no objection can be sustained.”

8. The Learned Counsel submitted that coming to the Notice of Preliminary Objection before this Court does the same meet the threshold set by law to govern Preliminary Objection? Their answer being in the negative. The Defendant/Objector herein is among other grounds challenging the ownership of the



suit property, yet he has not filed before this Court any evidence connecting him to the suit property. The Plaintiff herein in support of this suit has filed a list of documents showing on how it acquired the suit property. Additionally, the documents also demonstrate that the Plaintiff is the absolute and legal owner of the suit property.

9. It was the Learned Counsel's submission that whether or not the Defendant has a right of ownership of the suit property was a matter to be canvassed at the full trial of this matter. Therefore, on that head alone, the Defendant's Notice of Preliminary Objection dated May 19, 2022 ought to be dismissed with costs to the Plaintiff.
10. On whether this suit was "*sub – judice*" on account of Mombasa High Court Civil Suit No. 93 of 2021 which was filed first in time, the Learned Counsel submitted that the Plaintiff filed this suit on the 14th day of January, 2022 and served its pleadings herein upon the Defendant on the 21st day of January, 2022. The Defendant filed its memorandum of appearance on the 2nd day of February, 2022 and caused service of the same upon the Plaintiff on the 3rd day of February, 2022. After a period of one month the Defendant filed and served his statement of defence which was filed and served upon the Plaintiff's Advocates on the 2nd day of March, 2022.
11. The Learned Counsel submitted that the Plaintiff herein was not privy to High Court (Mombasa) Civil Suit No.EO93 of 2021 as at the time of filing this suit and was only joined to the above mentioned suit HCCC NO.93 of 2021) by way of an amended Plaint filed on the 30th day of March, 2022 and subsequently served upon the Advocates for the Plaintiffs on the 8th day of April, 2022 long after the Plaintiff had filed and served the pleadings herein this suit.
12. The Learned Counsel submitted that the provision of Section 6 of the Civil Procedure Act, Cap. 21 provided that:-

“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.”

13. The Learned Counsel submitted that upon service of the amended Plaint in Mombasa High Court Civil Suit No.93 of 2021 the Plaintiff herein who was the 3rd Defendant in a foresaid Suit filed a Notice of Preliminary objection dated April 19, 2022 and served upon the Defendant herein who was the Plaintiff in the said suit on the 21st day of April, 2022 raising among others the following points of law.
 - a. That the High Court lacked the jurisdiction to entertain the said matter for reasons that it was a land matter which fell within the arm bit of the Environment and Land Act No. 19 of 2011 as read with the provision of Article 162(2)(b) of the Constitution of Kenya (2010).
 - b. That the entire suit was filed against the 3rd Defendant (Plaintiff herein) was fatally defective, frivolous, scandalous, vexatious a non-starter and an abuse of the Court process.
 - c. That the Plaintiff (Defendant herein) had “no *locus standi*” to file this suit.
 - d. That the suit (MSA HCC NO. 93 OF 2021) was “*Res – Judicata*” owing to the fact that there exists a suit between the Plaintiff & 3rd Defendant herein touching on the issues in controversy in this suit being:- Mombasa ELC No. E003 of 2022 Bamoto Distributors Limited — Versus - Najmudin Noorali Mahamedali which suit the Plaintiff has already responded to *vide* his



defence dated March 1, 2022 filed and served upon the 3rd Defendant on the 2nd day of March, 2022.

- e. That the instant suit and the Application dated March 30, 2022 had been overtaken by events.
14. The Learned Counsel submitted that the above-mentioned Preliminary objection dated April 19, 2022 was pending before the High Court and indeed the same was slated for highlighting of submissions on the 12th day of July, 2022. He argued that it was the Defendant's Preliminary Objection dated May 19, 2022 in this suit that was "*sub – judice*" the Preliminary Objection dated April 19, 2022 filed in the High Court and not this suit. The Defendant ought to have waited for the outcome of the Preliminary Objection pending before Mombasa High Court in Civil Suit No. 93 of 2021 rather than rushing to file the Preliminary Objection before this Court.
15. The Learned Counsel submitted that "the doctrine of *Sub Judice*" prevented a Court from proceeding with the trial of any suit in which the matter in issue is directly and substantially same suit between the same parties pending before same or another Court with jurisdiction to determine it. The Defendant herein had in his submissions on the Notice of Preliminary Objection dated April 19, 2019 mentioned above requested for the transfer of Mombasa High Court Civil Case No. E093 of 2021 to this Court this demonstrated the Defendant's concession that the foresaid suit was filed in a Court that had no jurisdiction to entertain the same.
16. The Learned Counsel submitted that the Defendant herein had failed to demonstrate "the doctrine of *sub judice*" pleaded in his Preliminary Objection dated 19th day, 2022 and the upshot should be that the foresaid ground ought to fail.
17. On the issue that Mombasa High Court Civil Suit No. 93 of 2021 challenged the manner in which the Plaintiff acquired ownership of the suit property, the Plaintiff could not therefore initiate eviction proceedings while the said suit was still pending the Plaintiff submitted that under the provision of Section 13 of the [Environment and Land Act](#) No. 19 of 2011 which provides that:-
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2)(b) of [the Constitution](#), the Court shall have power to hear and determine disputes ? (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land."
18. The Learned Counsel submitted further that this Honorable Court be guided by the provisions of this Honorable Court be guided by the provisions of Article 162 (2) (b) of [the Constitution](#) which stated that:-
- "Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (b) the environment and the use and occupation of, and title to, land.
19. The Learned Counsel submitted that the issues in controversy regarding Mombasa High Court Civil Suit No. 93 of 2021 revolved around the acquisition of ownership of the suit property herein. He argued that the foresaid Court had no jurisdiction to entertain such issues in view of the above



mentioned provisions of the law. The same was justified by the provision of Article 165 (5) (a) & (5) b of *the Constitution* of Kenya (2010) which states that:

“The High Court shall not have jurisdiction in respect of matters:

- a. Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- b. Falling within the jurisdiction of the Courts contemplated in Article 162 (2).”

20. The Learned Counsel submitted that they had established that it was only this Honorable Court that was clothed with the jurisdiction of entertaining this suit. Therefore, he contended this suit would be better dealt with in this Court than in the High Court.

21. On the issue of the Court not having jurisdiction to hear and determine this matter, the Learned Counsel submitted that the Defendant seemed to blow both cold and hot, thus a major contradiction there, at the same time as he purported to allege in the filed Preliminary Objection dated May 19, 2022 that this Court had no jurisdiction to handle this matter yet in his written statement of Defence dated 1st March, 2022 filed and served upon the Plaintiff's Advocates on the 2nd day of March, 2022 the Defendant admitted the jurisdiction of this Court to handle this matter. This left the Court in a limbo on what to believe. He averred that the provisions of Section 6 of the *Civil Procedure Act*, Cap. 21 was categorical on which pending suit or proceedings could amount to *sub-judice*. According to the provisions of the law, a suit or proceedings was *sub-judice* if there was another case filed earlier in a Court that had jurisdiction in Kenya to grant the relief claimed. The Defendant's claim against the Plaintiff herein as contained in the amended Plaint dated March 22, 2022 in Mombasa High Court Civil Suit No. 93 of 2021 sought for the following orders among others:-

- a. “An Order of injunction restraining the Defendants from selling, transferring and/or in any other manner from interfering with the property known as Title Number Mombasa/Block XV/47 (Go down No.1).
- b. A declaration that the statutory power of sale conducted by the 1st and 2nd Defendant for the property known as Title Number Mombasa/Block XV/47 (Go down No.1) was premature and illegal as the 1st Defendant had not complied with the orders made by the Court on February 3, 2021 in Mombasa High Court Civil Suit No. E011 of 2020; Najmudin Noorali Mohamedali Vs I&m Bank Limited & Purple Royal Auctioneers.
- c. Further, to prayer (b) above, the Court to make a declaration that the transfer of the property known as Title Number Mombasa/Block XV/47 (Go down No. 1) in favour of the 3rd Defendant is illegal, null and void.
- d. An order directing the Land Registrar, Mombasa to cancel the transfer of the Title Number Mombasa/Block XV/47 (Go-down No. 1) from the Plaintiff's name to the 3rd Defendant and revert back the property in the Plaintiff's name.”

22. The Learned Counsel submitted that the prayers sought were purely touching on matters relating to land contemplated under the provisions of Articles 162 (2) and 165 of *the Constitution* of Kenya, 2010. By all means, the High Court had no jurisdiction to handle matters dealing with land.

23. To buttress its point, the Learned referred to the case of:- ”*The Owners of Motor-vessel “Lillian S” – Versus - Caltex Oil (K) Limited* (1989) KLR I where Nyarangi J.A. held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue



right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. The Learned Counsel also made reference to the case of:- ”*NWN – Versus - LNM* (2022) eKLR by the Environment and Land Court sitting at Kerugoya which observed in Paragraph 24 of its Judgment, inter alia’:-

“The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land. This Court therefore adopts a similar position and finds that it has the Jurisdiction to adjudicate this matter as the same relates or involves land, and therefore the defendants submissions in this regard has no basis.”

25. The Learned Counsel submitted that the cases of:- “Mombasa High Court Civil Suit No. E093 OF 2021 Najmudin Noorali Mohamedali – Versus - I & M Bank Limited, Purple Royal Auctioneers and Bamoto Distributors Limited as filed against the Plaintiff herein was filed in a Court of no jurisdiction and the better place it ought to have been filed was in this Court and it served no purpose in law to dismiss the suit herein at the instance of the Defendant’s aforesaid suit in the High Court. The only remedy left for the Defendant herein was to withdraw Mombasa High Court butt No.93 of 2021 and file his evidence in this suit and defend himself against the allegations contained in the Plaint herein in a full trial of this matter.

26. The Learned Counsel concluded that there would be no prejudice occasioned to the Defendant herein in the event that the Preliminary Objection dated 19th day, 2022, was dismissed as the Defendant was still a party in this suit. Besides, parties herein would still be heard by this Court and a determination be made on who was the rightful/lawful owner of the suit property herein.

III. The Legal Analysis and Determination

27. I have keenly considered the objection raised through the Notice of Preliminary Objection dated May 19, 2022 by the Defendant/Objetor herein, the rival and detailed written submissions, the myriad authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

28. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) issues for its determination. These are:-

- a. Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated May 19, 2022 meets the threshold founded in Law and precedents.
- b. Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated May 19, 2022.
- c. Who will bear the Costs of the Objection.

ISSUE No. a). Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated May 19, 2022 meets the threshold founded in Law and precedents.



29. Taking that the Defendant/Objector has raised the issue of *Sub - Judice*, this Honorable Court will deal with it as a preliminary objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

30. The above legal proposition has been made graphically clear in the now famous case of “*Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd.* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

31. I have further relied on the decision of “*Attorney General & Another – Versus - Andrew Mwaura Gitinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

32. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. For instance in that the Defendant holds that there is a similar matter pertaining the same parties in “the High Court of Mombasa Mombasa High Court Civil Suit No. E093 OF 2021 Najmudin Noorali Mohamedali vs I & M Bank Limited, Purple Royal Auctioneers and Bamoto Distributors Limited”. Based on this legal ratio, I therefore, find that the filed Preliminary objection raised by the Defendant fails to satisfy this ingredient for a Preliminary objection. In saying so, the Court will proceed to demonstrate this assertion here below.

Issue No. b). Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 19th May, 2022.



33. Now turning to the issue of Sub judice as provided for under Section 6 of the [Civil Procedure Act](#), CAP. 21 which provides as follows:-

“6. 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”.

34. The Defendant/Objector contended that the suit offends the doctrine of Sub - Judice. He claimed that there was another pending suit between the same parties before the High Court. The Defendant/Objector has disputed the Plaintiff's claim.

35. From keen assessment, it is found out that there has been numerous decisions which have put the issue on “the Doctrine of *Sub Judice*” into perspective. In the case of:- ”[Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 Others](#) (2002) eKLR, the Supreme Court of Kenya held:-

“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”.

36. In the case of ”[Margaret Wachu Karuri – Versus - John Waweru Ribiuro](#) (2021) eKLR”, the Court was faced with a similar question whether “the doctrine of *Sub – judice*” could 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 Defendant/Objector does not amount to a preliminary objection, and thus the Preliminary Objection is not merited”.

Consequently, the Court finds and holds that the notice of preliminary objection dated August 30, 2019, by the Defendant/Objector is not merited and the same is dismissed entirely with costs to the Plaintiff/Respondent”.

37. This Honorable Court entirely agrees with this legal reasoning in the above decision which is in all fours with the instant case. I reiterate that the Preliminary objection cannot be successful.



Issue No. c). Who will bear the Costs of the Objection

38. The *Black Law Dictionary* defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

Ideally, it is trite law that issues of Costs are at the discretion of the Honorable Court. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By events it means the results and outcome of any legal action, proceeding or process in any litigation. In the case of “*Reids Hewett & Company – Versus – Joseph* AIR 1918 cal. 717 & *Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

39. The events in the instant case is that the Preliminary Objection raised by the Defendant/Objector herein has failed. For that very reason, the Defendant/Objector herein will bear the Costs of the objection to be awarded to the Plaintiff herein.

VI. Conclusion & Disposition

40. In conclusion, having conducted an intensive analysis of the framed issues herein, on preponderance of probability, the Honorable Court proceeds to make the following orders.
- a. That the Notice of Preliminary Objection dated May 19, 2022, by the Defendant/Objector herein be and is not merited and the same is hereby dismissed with costs.
 - b. That for the sake of expediency this matter be fixed for hearing and determination within the next One Hundred and eighty (180) days from this date being on May 18, 2023. There be a mention on March 2, 2023 for the Pre – Trial Conference pursuant to the provision of Order 11 of the *Civil Procedure Rules*, 2010. Notice to issue.
 - c. That the costs of the objection to be awarded to the Plaintiff/Respondent.
41. It is so ordered Accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF DECEMBER, 2022.

HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant.
- b. Mr. Opwapo Advocate for the Plaintiff/Respondent.
- c. No appearance for the Defendant/Objector despite the notices having been dispatched accordingly.

