



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC PETITION CASE NO. 13 OF 2019

(FORMERLY HIGH COURT PETITION 10 OF 2019)

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INTERPRETATION OF ARTICLES 22, 40

AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

KIBWARI PLC.....PETITIONER

AND

PRINCIPAL LAND REGISTRATION OFFICER

MINISTRY OF LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

COUNTY LAND REGISTRAR

COUNTY GOVERNMENT OF NANDI.....2ND RESPONDENT

KETTICHEM COMPANY LTD 3RD RESPONDENT

JOSEPH CHEPKWONY4TH RESPONDENT

PAUL CHEBARUS5TH RESPONDENT

SAMUEL KETER..... 6TH RESPONDENT

COUNTY GOVERNMENT OF NANDI.....7TH RESPONDENT

RULING

This ruling is in respect of an application brought by way of a Notice of Motion dated 5th August 2019, by the petitioner seeking for the following orders:

- a) This honourable court be pleased to stay the hearing and determination of the cross petition dated 19th July, 2019 filed by the county government of Nandi.
- b) Costs of the application be borne by the cross petitioner.

Parties agreed to canvass the application vide written submissions which were duly filed. It should be noted that this application was heard and a ruling delivered but the same was set aside on the application of the Petitioner's counsel on the grounds that they were not allowed to highlight their submissions. On 25th January 2021 counsel highlighted their submissions and reiterated the contents of their written submissions thereafter the matter was set down for delivery of ruling.

It should be noted that the highlighting of the submissions did not change what had been addressed in the written submission which the court analyzed to write the ruling that was set aside on the ground for a need to highlight. The court therefore arrived at the same conclusion that the application did not have merit.

PETITIONER/APPLICANT'S SUBMISSION

The Petitioner's Counsel Mr. Kosgei relied on the grounds on the face of the application and the supporting affidavit of the applicant. It was the petitioner's counsel's submission that the issues for determination in the cross petition are directly and substantially in issue between the same parties in four (4) other cases which were filed before the Cross-Petition namely: **JR Misc. 56 of 2019 (now ELC JR Misc 6 of 2020) between EPK, Siret, Kakuzi, Kibwari PLC ex parte Applicants v. County Government of Nandi; Petition No. 11 of 2019 between Stephen Sang & others v. Inspector General of Police, DCI, DPP and AG; Criminal Case Number 301 of 2019 Republic v. Stephen Sang; Criminal Revision Number 70 of 2019 Stephen Sang v. Republic.** He Further argued that the issues for determination in the cross-petition are also issues which are directly and substantially in issue in **Kisumu Cr. No. 301 of 2019 R vs Stephen Sang and Petition No. 11 of 2019 between Stephen Sang & Others vs. Inspector General of Police, DCI, DPP and AG.**

It was counsel's submission that the issues for determination in the cross petition are directly and substantially in issue in JR No. 56 of 2019 between EPK, Siret, Kakuzi, Kibwari PLC ex parte applicants and county Government of Nandi. Further that the issues for determination in the cross- petition are also issues which are directly and substantially in issue in **Kisumu Cr. No. 301 of 2019 R vs Stephen Sang and Petition No. 11 of 2019 between Stephen Sang & Others vs. Inspector General of Police, DCI, DPP and AG.**

Counsel also submitted that there are a multiplicity of cases touching on the same subject matter and it is in the interest of justice that the cross petition be stayed to avoid duplication and inconsistency in court processes and decisions.

Counsel relied on the provisions of Section 6 of the Civil Procedure Act which provides:-

“ No court shall proceed with the trial of any suit or proceedings 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 proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Mr. Kosgey counsel for the applicant submitted that once a suit is found to be *sub judice*, certain conditions must be met as was enumerated in the case of **Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others [2017] eKLR** where Odunga J held as follows:

“32. Therefore, for the principle to apply certain conditions precedent must be shown to exist:

- a. First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit;*
- b. proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title;*
- c. and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

Counsel further submitted that Odunga J in the same case quoted the case of **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR** where the Court opined that:

“35. ...It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”

Mr. Kosgey also submitted that the proceedings in the Cross-Petition are *sub judice* to **JR Misc. 56 of 2019 (now ELC JR Misc 6 of 2020)** in the following manner:

- a) The Judicial Review Application was lodged pursuant to Gazette Notice dated 18th February 2019 which recommended *inter alia*:

‘A resurvey be done on the lands being held by the tea estates to determine if there is any residue to be held in trust for the community by the County Government for public utilities.’

- b) An Order was issued by Honourable Justice Pauline Nyamweya staying the implementation of the recommendations contained in the Gazette Notice dated 18th February 2019 and thereby prohibiting the Cross-Petitioner from making a claim over the Petitioner's property or making claims over any portions of tea estates for purposes of public utilities.

c) That the above Court Order was breached when the Governor of Nandi County Stephen Sang led a team of officials and elected leaders of the Cross-Petition to invade the Petitioner's private property **LR No. 6075** claiming that the same was a public utility purportedly known as **Nandi Hills/ Kapsimotwo Block 2 (Kettchem) 234**. Contempt proceedings against the contemnors including the Cross-Petitioner have been instituted by the Petitioner herein.

d) Counsel further submitted that the parties in the above case are the same as the parties in the current Cross-Petition as follows:

a. The Petitioner herein, Kibwari PLC, is the ex-parte Applicant in the above case.

b. The Cross-Petitioner herein, the County Government of Nandi, is the 3rd Respondent in the above case.

c. The 3rd Respondent herein, the Director of Survey is the 2nd Respondent in the above case.

d. The 4th Respondent herein, National Land Commission, is the 1st Respondent in the above case.

e. That contempt proceedings are pending for hearing in the Environment and Land Court at Nairobi before Honourable Justice Elijah Obaga and the same has been fixed for mention on 21st May 2020.

Further that the proceedings in the Cross-Petition are *sub judice* to **High Court Petition 11 of 2019** in that the same was instituted in a bid to stop the arrest of Governor Stephen Sang after he was charged with invasion of **LR No. 6075** claiming that the same was a public

utility purportedly known as **Nandi Hills/ Kapsimotwo Block 2 (Kettchem) 234**. That the parties are also similar as the Petitioner herein, Kibwari PLC, is the proposed Interested Party in the above case and the Cross-Petitioner herein, the County Government of Nandi, is the 3rd Respondent and the 5th Respondent the Attorney General is the 4th Respondent in the above case.

Counsel submitted that the proceedings in the Cross-Petition are *sub judice* to **Criminal Case 301 of 2019** in that Governor Stephen Sang was charged with the offence of malicious damage to property, incitement of the public, abuse of office and assault whereby the complainant is Kibwari PLC, the Petitioner herein and that the issues in the criminal case are substantially the same. Counsel therefore submitted that in view of the foregoing, it is clear that the issues set out in this Cross Petition are the subject of the following existing suits.

a) **JR 56 of 2019 - EPK, Kakuzi, Siret, Kibwari vs. County Government of Nandi and others.**

b) **Petition 11 of 2019 Eldoret – Stephen Sang and others vs. Inspector General, DPP, DCI, AG and others.**

c) **Criminal Case No. 301 of 2019 – Republic vs. Stephen Sang in which the Petitioner is a Complainant.**

d) **Criminal Revision no. 70 of 2019- Stephen Sang v. Republic in which the Petitioner is the Complainant.**

It was the Applicant's counsel's submission that the principle of *sub judice* was reiterated by the Court of Appeal when they upheld the decision of this court in the case of **Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others [2019] eKLR**. The court had this to say:

‘The learned Judge in her considered ruling held that the filing of the petition in respect of the same parties in which the matter in issue was directly and substantially in issue in ELC No. 231 of 2012 pending before a court of competent jurisdiction was clearly an abuse of the court process.

Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action. The filing of the petition before the trial court in the face of the consent order in ELC No. 231 of 2012 was clearly an abuse of court process and sub judice. The trial court cannot therefore be blamed for so holding.’

Mr. Kosgey counsel for the applicant submitted that the rationale and effect of the enactment of Section 6 was well captured in the case of **Nguruman Limited v Jan Bonde Nielson (2014) eKLR where the court stated as follows:**

“40. ...That section prohibits courts from proceeding with the trial of any suit or proceedings 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.”

The above sentiments were reiterated in Kampala High Court Civil Suit No. 450 of 1993 - **Nyanza Garage vs. Attorney General** as quoted by the Learned Judge Honourable Justice Odunga in **Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others [2017] eKLR** where it was held:

“33. ...In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of

time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

Counsel finally submitted that it is therefore fair and in the interest of justice that the Cross-Petition be stayed so as to avoid a multiplicity of actions and inconsistency in court decisions and that the Cross Petition is intended to obstruct the fair trial of these matters.

These submissions were reiterated by Mr. Kosgei during the highlighting on 25th January 2021.

7TH RESPONDENT’S/CROSS-PETITIONER’S WRITTEN SUBMISSIONS

Counsel for the 7th respondent opposed the application vide a replying affidavit and gave a brief background to this petition. That the petitioner filed this petition together with an application for injunction, which application was compromised by the parties to fast track the hearing.

Mr. Tororei counsel for the 7th Respondent submitted that it is instructive that the Petition was filed on the 30th of May 2019, which was earlier than both **Petition Number 11 of 2019** filed on the 10th of June 2019 and **Criminal Case 301 of 2019** where the charges were read on the same 11th of June 2019. That the Petition was however filed after **JR No. 56 of 2019**.

Counsel submitted that the respondents filed a response Petition and also preferred a cross-Petition seeking for the following reliefs: -

- a)
- b) **A DECLARATION** that the cross-petitioner is the lawful proprietor of that parcel of land known as **Nandi Hills/ Kapsimotwa Block 2 (Kettchem)/234** pursuant to Articles 62 and 63 of the Constitution.
- c) **A DECLARATION** that the 1st Respondent’s conduct and actions in demolishing the cattle dip on that parcel of land known as **Nandi Hills/ Kapsimotwa Block 2 (Kettchem)/234** and planting tea bushes thereon is unlawful and constitutes trespass and illegal encroachment on community/public property thus a violation of the rights of the people of Nandi County.
- d) **AN ORDER OF CERTIORARI** do issue to remove to this Honourable Court to be quashed, the decision of the 2nd respondent to cancel title of that parcel of land known as **Nandi Hills/ Kapsimotwa Block 2 (Kettchem)/234**.
- e) **AN ORDER OF MANDAMUS** do issue to compel the 2nd respondent to issue title in respect of that parcel of land known as **Nandi Hills/ Kapsimotwa Block 2 (Kettchem)/234**
- f) **A DECLARATION** that the cross-petitioner is entitled to the payment of damages and compensation for the gross violations and contraventions of his constitutional rights and freedoms under the aforementioned provisions of the Constitution.

Mr. Tororei therefore submitted that it is apparent that the prayers in the Cross-Petition directly emanates from the prayers sought in the Petition. Counsel stated that the main issue for determination is whether or not the cross-petition as preferred is *res sub judice* as per Section 6 of the Civil Procedure Act.

Counsel relied on the case of **Total Kenya Limited vs Fanana Investments Limited, Nairobi HCCC 743 of 1999, where Waki J** held that where the issues in two suits are substantially the same, the law requires that the latter suit be stayed. Further in the case of **Ismail S Mboya and others vs Mohamed Haji Issa and others, Kisumu HCCC 106 of 2003, Gacheche J** held that where there is a matter pending in a court of competent jurisdiction between substantially the same parties touching on the same issues, the court lacks jurisdiction to entertain a similar matter.

Mr. Tororei submitted that the petitioner has the onus of demonstrating to this honourable court that:

- a) The matter in issue in the cross-petition is directly and substantially in issue with Nairobi JR No 56 OF 2019, Kisumu Criminal Case No 301 of 2019 and Eldoret Petition 11 of 2019; or
- b) The matters alleged to be directly and substantially in issue are proceeding between the same parties or between parties under whom the parties herein or any of them claim litigating under the same title; or
- c) The cross-petition and above-mentioned matters are pending before this honourable court or any other court with jurisdiction in Kenya to grant the orders sought in the cross-petition.

It was counsel’s humble submission that the applicant has not demonstrated to this court the elements that constitute *res sub judice* to warrant grant of the orders he has sought for the following reasons:

- a) Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 15 (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 allows a Respondent in a petition to respond by way of a cross-petition if the said person alleges that their constitutionally guaranteed rights

have been violated. That the applicant has in its Petition sought to have possession of the suit properties and the 7th respondent in response to the petition filed an amended cross-petition to assert its rights over the property known as **Nandi Hills/ Kapsimotwa Block 2 (Kettchem)/234** which is stated to be public land which it holds for the benefit of the citizenry of Nandi County.

b) That in determining the Petition, this court shall ultimately have to determine the ownership of the said property and this is the only court clothed with the requisite jurisdiction to hear and determine the ownership of **Nandi Hills/ Kapsimotwa Block 2 (Kettchem)/234**. That the issue of ownership of this land is not pending before another court.

Counsel submitted that the issues in the cross-petition differ from those in Nairobi JR No 56 OF 2019, Kisumu Criminal Case No 301 of 2019 and Eldoret Petition 11 of 2019 as follows:

a) **Nairobi JR No 56 OF 2019**, does not seek to determine the issues in this petition or the cross Petition as its filing was triggered by the decision of the National Land Commission when it published recommendations relevant to Historical Land Injustice complaints Reference numbers **NLC/HLI/013/2017**, **NLC/HLI/033/2017**, **NLC/HLI/447/2018** and **NLC/HLI/546/2018**, vide Gazette Notice Vol. CXXI-No. 27 on 1st March 2019 more particularly the recommendation *inter alia* that:-

“A resurvey be done on the lands being held by the tea estates to determine if there is any residue to be held in trust for the community by the County Government for public utilities”

b) The ex-Parte applicants therein were aggrieved by the alleged failure by the National Land Commission to grant them a fair hearing and that Nairobi JR No 56 of 2019 was preferred for purposes of determining whether or not the decision-making process was in accordance to the law.

c) That the Petitioner is well aware that the issue of titling and ownership of **Nandi Hills/ Kapsimotwa Block 2 (Kettchem) 234** would not be determined in Judicial review 56 of 2019 hence its decision to file the present Petition and as such a party cannot be allowed to aprobe and reprobe in the cause.

As regards Kisumu Criminal Case 301 of 2019, counsel submitted that Article 157 of the Constitution bestows power upon the Director of Public Prosecutions to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Section 6 of the Magistrates Court Act bestows jurisdiction upon Magistrate’s court to hear and determine proceedings of a criminal nature. That in the criminal case, the Governor has been charged with three counts of malicious damage to property, incitement to violence and abuse of office and the subject property in the case is alleged to be **LR. No 6075**.

Counsel submitted that Article 22 of the Constitution afforded the 7th respondent a right to seek enforcement of the constitutional right to acquire and own property through the amended cross-petition under Article 23 when its rights were violated, further that the criminal case does not fall within the ambit of Article 22 of the Constitution. The pendency of the criminal charges should not override the public interest to protect public property against grabbing.

It was counsel’s submission that the court in Kisumu being a Magistrate’s court, does not have jurisdiction to hear Constitutional Petition or Cross Petition and importantly cannot pronounce itself on matters touching on land and titling when it sits as a criminal court.

Counsel submitted that KISUMU REVISION No. 70 OF 2019 was determined when the same was dismissed vide the ruling dated 26th of September 2019 and therefore it is no relevance to the present application before court.

As regards Petition No 11 of 2019, counsel submitted that every person has a right to pursue enforcement of a constitutional right should the same be threatened and/or violated under Article 22 and 23 of the Constitution and the filing was triggered when the police began intimidating and harassing the Governor and even proceeded to summon him. This prompted the Governor to prefer the Petition 11 of 2019 claiming and seeking to stop malicious prosecution by the Director of Public Prosecutions that threatened to violate his right to freedom and security of person as guaranteed under Article 29 of the Constitution. That the matter having been filed in the High Court, which court does not have jurisdiction to determine the question of ownership of land.

On the issue of similar parties litigating under same title, counsel submitted that the parties in the amended cross-petition are substantially different from Nairobi JR No 56 OF 2019, Kisumu Criminal Case No 301 of 2019 and Eldoret Petition 11 of 2019, in that the 7th respondent is the cross-petitioner while the respondents are the petitioner herein, the County Land Registrar Nandi County, the Director of Survey, the National Land Commission and the Attorney General.

In **Nairobi JR 56/2019**, counsel submitted that the parties are: the *ex-parte* applicants being Eastern Produce Kenya Limited, Siret Tea Company Limited, Kakuzi PLC (Kaboswa Estate) and Kibwari PLC, while the respondents are National Land Commission, Director of Survey and Nandi County Government and that the subject matter is completely different from the subject matter herein.

While in the **Kisumu Criminal Case 301 of 2019**, the parties in the criminal case are: the prosecution on behalf of the state and Governor Stephen Kipyego Sang and that in **Eldoret Petition 11 of 2019** the parties are: Governor Stephen Kipyego Sang, Dr Bernard Kiplimo Lagat and Nandi County Government as the petitioners while the respondents are Inspector General of Police, the Director of Criminal Investigations, the Director of Public Prosecution and the Attorney General whereby the petitioner herein is not a party to the proceedings therein.

On the issue of jurisdiction counsel submitted that for the court to make a finding that a suit is *res sub judice*, the petitioner also has to demonstrate that this court or any other court of competent jurisdiction can grant reliefs sought in the cross-petition and which reliefs are similar to the earlier filed suits, viz that the reliefs sought in the cross-petition can be granted in Nairobi JR No 56 of 2019, Kisumu Criminal

Case No 301 of 2019 and Eldoret Petition 11 of 2019. Counsel submitted that the petitioner has failed this test.

Counsel relied on the case of **Lucy Wanjiku Muku v Karl Salzmann & 3 others [2019] eKLR**, Justice Ogola rendered himself thus:

“In view of the foregoing, the option this court takes is that all the said suits have not been determined. There are cross cutting and similar issues. However, the petition prima facie shows constitutional issues which are not found in the other two suits and which cannot be addressed elsewhere but in this Court”

Counsel therefore urged the court to dismiss the application with costs to the respondents. Mr Tororei’s highlights were as per the submissions filed in respect of the application.

The AG for the 3rd and 5th Respondent submitted that the application is between the petitioner and the 7th Respondent and therefore they were not participating.

ANALYSIS AND DETERMINATION

The issue for determination is whether the cross- petition is *sub judice* as submitted by the petitioner/ applicant. For a suit to be *sub judice* it must meet the threshold as provided for under Section 6 of the Civil Procedure Act. The questions that must be asked and answered are as to whether the matter in issue is also directly and substantially in issue in a previously instituted suit, is the suit in respect of the same parties or between parties under whom they or any of them claim, are they litigating under the same title, and finally whether the pending case in any other court having jurisdiction to grant the reliefs sought?

If an applicant answers the above questions as provided for under Section 6 of the CPA in the affirmative, then the court cannot proceed with such a trial. The purpose of Section 6 is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter. It is meant to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. 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 an application for stay of proceedings, the court must be satisfied that the court where the other suit has been filed has jurisdiction to hear and grant the reliefs sought. There would be no justification of reason to stay a suit and hand it over to a court without the requisite jurisdiction to grant the reliefs sought. This would amount to miscarriage of justice.

In the case of **NAIROBI JUDICIAL REVIEW DIVISION(HCJR/E045/2020): REPUBLIC VS PAUL KIHARA KARIUKI, ATTORNEY GENERAL & 2 OTHERS & LAW SOCIETY OF KENYA, EX PARTE APPLICANT, Justice Mativo** had the following to say on *sub judice*

“.....19. In order to check this very problem, there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

20. In this regard, section 6 of the Civil Procedure Act expressly provides 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.

22. The Black’s Law Dictionary defines lis pendens, as a Latin expression which simply refers to a “pending suit or action.” The Oxford Dictionary of Law defines the expression in similar terms. In the context of Section 6 of the Civil Procedure Act which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.”

The learned judge further relied on the decision by the **The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)** where the court had occasion to pronounce itself on the subject of *sub judice* as follows: -

[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.

24. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is

to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

25. In a fairly recent decision of this court, namely JR No. 146 of 2020, which incidentally involved the Law Society of Kenya, I stated that the words “directly and substantially in issue” are used in contradistinction to the words “incidentally or collaterally in issue.” Therefore, sub judice would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical.

26. Paraphrasing what I said in the above case, the key words in applying sub judice rule is that “the matter in issue is directly and substantially in issue in the previously instituted suit.” The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.”

Looking at the petition and the cross – petition and the reliefs sought, it is imperative to note that they both seek for a declaration on the ownership of the suit land with other declaratory orders of prohibition and injunction restraining the 1st and 2nd respondents from issuing titles in respect of the suit land.

The Petitioner has listed the following suits as the basis of the application of *sub judice*:

- a) **JR 56 of 2019 - EPK, Kakuzi, Siret, Kibwari vs. County Government of Nandi and others.**
- b) **Petition 11 of 2019 Eldoret – Stephen Sang and others vs. Inspector General, DPP, DCI, AG and others.**
- c) **Criminal Case No. 301 of 2019 – Republic vs. Stephen Sang in which the Petitioner is a Complainant.**
- d) **Criminal Revision no. 70 of 2019- Stephen Sang v. Republic in which the Petitioner is the Complainant.**

From the pleadings availed to court, the first case which is Judicial Review No.56 of 2019, is in respect of EPK, Kakuzi, Siret, Kibwari vs. County Government of Nandi and others. The judicial review orders are seeking to quash the recommendations as set out in the Gazette Notice, prohibition orders against the Director of Survey from enforcing the recommendations in the Gazette Notice and declaratory orders that the proceedings by the National Land Commission were tainted with illegality. The reliefs therefore are not similar to the prayers or orders being sought in the cross-petition which are declaratory orders of proprietary rights held by the 7th respondent in Nandi Hills/Kapsimotwa Block 2 (Kettchem) 234. The court is being urged to determine whether or not the decision-making process was in accordance to the law.

The purpose of Judicial Review is as was stated in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR**. The Court of Appeal stated that in judicial review:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a Court of Appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

It is worth noting that a judicial review in nature concerns procedure rather than ownership of land. This position was enumerated in the case of: -

KITALE ELC JUDICIAL REVIEW NO. 2 OF 2019; BEATRICE CHEPTAUS KOKWO ALIAS CHEPKOKWO & ANOR VS DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT &ANOR, [2019] eKLR where the learned judge relied on the case of; - **Republic vs. Commissioner of Lands & Another, ex-parte Hammer Heads Limited [2013] eKLR** where the court held as follows:

“A judicial review application does not deal with the merits of the case but only with the process. In other words, judicial review applications do determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view of determining contested matters of fact and in effect determine the merits of the dispute the court would not have jurisdiction in judicial review proceedings to determine such dispute and would leave the parties to ventilate the merits of the dispute in the ordinary suits.”

Having said that, would the issue of ownership be determined in JR No 56 of 2019? If the answer is in the negative, then the same does not meet the threshold of the matter being *sub judice* on the requirement of a court having the jurisdiction to hear and grant the reliefs sought.

The 7th respondent has preferred the amended cross-petition to the Environment and Land Court alleging a violation of its constitutional right

to acquire and own property under Article 40. The Environment and Land Court pursuant to Article 162 (2) (b) of the Constitution and section 13 (2) of the Environment and Land Court Act grants the court jurisdiction to hear matters relating to land and environment.

As regards **Kisumu Criminal Case 301 of 2019**, the same is a criminal case at Kisumu Magistrates court in its capacity as a criminal court whose jurisdiction flows from section 6 of the Magistrates Court Act. In this capacity, it lacks the requisite jurisdiction to hear and determine land matters and grant orders as a land court, which derives its jurisdiction from Article 162 (2) (b) of the Constitution, section 13(2) of the Environment and Land Court Act and Article 23 (3) of the Constitution to grant the orders sought. A criminal court sitting as such cannot decide on ownership issues of a parcel of land.

In Eldoret High Court Petition No 11 of 2019 the Governor Stephen Kipyego Sang, Dr Bernard Kiplimo Lagat and Nandi County Government invoked the court's jurisdiction under Article 165 of the Constitution seeking declaratory orders that the actions of the Inspector-General of Police, the Director of Criminal Investigations and the Director of Public Prosecutions seeking to investigate and/or prosecute contravened the petitioners' rights under Article 29 of the right to freedom and security of person, were illegal, malicious, an abuse of power and the criminal justice system; and judicial review remedies of prohibition against the respondents from conducting investigations and/or prosecuting the petitioners as pertains **Nandi Hills/ Kapsimotwa Block 2 (Kettchem) 234**. It is on record that the same was filed in the High Court which has no jurisdiction to hear and determine use and ownership land matters.

Finally, Kisumu Criminal Revision No 70 of 2019 was determined when the same was dismissed vide the ruling dated 26th of September 2019 and therefore it is out of the question.

I have considered the application, the submissions, the highlighting and the relevant judicial authorities and come to the conclusion that the applicant has not met the threshold for the orders sought. The cross petition is not *sub judice* and therefore the application is dismissed with costs to the 7th respondent.

DATED and DELIVERED at ELDORET this 25TH DAY OF FEBRUARY, 2021

M. A. ODENY

JUDGE