



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 33 OF 2020

**SALIM MWABENDO MWAGUITTA (Suing as the personal representative
of the estate of RIZIKI MWAMWENDA CHIRIMA.....PLAINTIFF**

VERSUS

THE COUNTY GOVERNMENT OF KWALE.....DEFENDANT

RULING

1. This ruling is in respect of the Defendant's preliminary objection dated 13th October, 2020 seeking to have the applications dated 2nd March, 2020 and 17th March, 2020 and the suit herein struck out with costs on the following grounds:

i. This suit and application is sub judice

ii. The application is filed contrary to Section 6 of the Civil Procedure Act, 2010 and therefore the Honourable Court lacks jurisdiction to grant the orders prayed for.

iii. In any case, the application is bad in law, vexatious and an abuse of the court process.

2. The preliminary objection was canvassed by way of written submissions. In the submissions dated 6th November, 2020, the defendant submitted that the application and the suit are sub judice and offends the provisions of Sections 6 of the Civil Procedure Act because the plaintiff filed **Mombasa HCCC No. 65 of 2006 Riziki Mwawenda Chimira –v- Kwale Town Council** which is pending judgment in court and has never been fully concluded. The defendant submitted that the suit therein involves the same subject matter which is LR. No. 5007/118 CR No.34206, a fact which the plaintiff expressly admits in the supporting affidavit dated 2nd March 2020. The defendant relied on the case of **Thiba Min. Hydro. CO. Ltd-v- Josphat Karu Ndwiga (2013)eKLR** and submitted that the plaintiff ought to have filed any interim applications within the existing suit and not commence new proceedings which in turn create a multiplicity of suits. That in any event, the plaintiff has not produced any ex-parte or interlocutory judgment that shows that the matter has been heard and determined. Further, that the applicant in the supporting affidavit dated 2nd March, 2020 annexed Limited Grant of Letters of Administration Ad Litem which were obtained on 14th February 2020 and a Death Certificate showing that the deceased died on 21st November, 2019. The defendant cited the provisions of Order 24 Rule 3 (2) and Rule 7 (1) and submitted that the present suit is a nullity and *void ab initio* for the reasons that not only is it sub-judice, but the plaintiff is estopped from filing this suit by dint of Order 24 Rule 7(1) which provides that where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action. Consequently, the defendant submitted that the court lacks the requisite jurisdiction to entertain the same and urged the court to strike out the suit entirely with costs to the defendant. The defendant submitted that the preliminary objection raised meets the threshold set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969)EA 696** and also relied on the case of **Samuel Waweru –v- Geoffrey Muhoro Mwangi (2014)eKLR**.

3. In his submissions filed on 17th November, 2020, the plaintiff submitted that he filed this suit as the Administrator of the Estate of Riziki Mwamwanda and stated in the plaint that "there was **HCCC NO.65 of 2006 Riziki Mwamwanda Chimira –v- Kwale Town Council**." That Kwale Town Council became defunct after the promulgation of the Constitution 2010 and that no suit can be against it since 2012.

4. That this is a fresh case against the County Government of Kwale which is a different entity and that Gazette Notice published on 24.3.12 established a structure for transfer of assets and liabilities of the defunct local council to the county government as captured in the Transition to Devolved Government Act 2012.

5. The plaintiff's submission is that this court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 165 of the Constitution and also cited the provisions of Section 3A, 3 and 5 of the Civil Procedure Act. The plaintiff submitted that

the key word in Section 6 of the Civil Procedure Act are same parties, same subject matter and concurrent jurisdiction and submitted that HCCC No. 65 of 2006 involved different parties and there is no evidence that suit is pending. The plaintiff submitted that said Section 6 does not empower the court to strike out a suit but only allows for stay of the suit. That the onus is on the defendant as provided in Section 109 of Evidence act to prove that there is pending suit between the parties herein. The plaintiff submitted that the suit, HCCC NO. 65 of 2006 cannot be resurrected as the plaintiff, Riziki Mwamwanda Chimira having passed away there was no suit that could survive under Order 24 Rule 3(2) and as Kwale Town Council, the defendant in that suit had become defunct in 2012. The plaintiff also relied on the case of **ASL Credit Limited –v- Abdi Basid Sheikh Ali & Another, (2019)eKLR** in which in similar application that court observed that the issues raised in the preliminary objection were not on purely a point of law but facts that could only be determined in a hearing. The plaintiff also relied in the famous of **Mukisa Biscuit Manufacturing Co. Ltd (supra)** and urged the court to dismiss the preliminary objection with costs.

6. I have considered the pleadings, the preliminary objection raised and the rival submissions made. The main ground of the objection is that the plaintiff's suit is sub-judice. A preliminary objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. In the case of **Mukisa Biscuit Manufacturing Co. Ltd (Supra)**, Sir Charles Newbold, President stated as follows:

“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 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 is the exercise of Judicial discretion.”

7. At this stage, the court will only consider legal issues that go to the root of whether there is a competent suit before court and/or whether the court has/lacks jurisdiction to hear and determine such matter. Section 6 of the Civil Procedure Act 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.”

8. In the case of **Republic –v-Registrar of Societies-Kenya &2 Others (2017)eKLR**, it was held that:

“....Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same 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...”

9. Going by the above provisions of law and cited cases, it is clear that what the doctrine of sub-judice entails are same parties involved in the same/similar subject matter in various suits in different courts. In the plaint, the plaintiff has stated that there was a suit **HCCC No.65 of 2006 Riziki Mwamwanda Chirima -v- Kwale Town Council**. The plaintiff has annexed a copy of an order issued on 10th April 2006 restraining the defendant (Kwale Town Council) from constructing or erecting sheds or structures of any kind or otherwise dealing with the plot known as LR. NO. 5007/118 CR NO.34206 for fourteen (14) days pending the hearing of the application dated 5th April, 2006. However, it is not clear as to the position of that application and indeed the entire suit. It is the plaintiff's submission that the plaintiff in HCCC No. 65 of 2006 passed away while the defendant is now defunct and therefore that suit cannot be resurrected. On its part, the defendant's submission is that HCCC NO.65 of 2006 has abated and pursuant to the provisions of Order 24 Rule 7 (1) of the Civil Procedure Rules, the present suit is a nullity and void *ab initio*. It is clear from the rival submissions that the parties herein are not in agreement as to the facts of HCCC NO.65 of 2006 and the present suit. The parties herein have clearly raised facts that have to be ascertained. In my view, parties cannot also be allowed to raise issues of facts through the rival submissions. Raising issues of facts through submissions amounts to giving evidence from the bar which in my view, is not proper as there is a clear legal procedure on how facts or evidence ought to be laid before a court of law. Since there are disputed facts that are not agreed, and which facts have to be ascertained, I find that the objection in that regard cannot be sustained. As already stated, a preliminary objection should raise a pure point of law which is argued on the presumption that all facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained. Further, even if a successful plea of sub-judice had been proved, the appropriate remedy is not to strike out the suit herein as the defendant has asked me to do. Instead, the viable order that could commend itself is for this suit to be stayed pending the determination of HCCC NO.65 of 2006.

10. For the foregoing reasons, I am inclined to dismiss the preliminary objection dated 13th October, 2020 and decline to strike out the suit or the applications herein. The plaintiff shall have costs.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 16th day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE