



Tum (Suing as the Legal Representative of the Estate of Kiptum arap Keter) v Metet & 2 others (Environmental and Land Originating Summons E008 of 2024) [2025] KEELC 5281 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2024
LA OMOLLO, J
JULY 10, 2025**

BETWEEN

**KIPROTICH ARAP TUM APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIPTUM
ARAP KETER**

AND

**ALFRED KIPKEMOI METET 1ST RESPONDENT
DAVID KIMUTAI METET 2ND RESPONDENT
LAND REGISTRAR, KERICHO 3RD RESPONDENT**

RULING

Introduction.

1. This ruling is in respect of the 1st Respondent's Preliminary Objection dated 13th May, 2024. It is on the following grounds;
 - a. That the issues canvassed in support of the said application are sub judice under Section 6 of the *Civil Procedure Act* as the issue of boundary re-establishment was dealt with in *Kericho Chief Magistrate Miscellaneous Environment and Land Court No. E025 of 2023*. (sic) The matter is pending finalization thus a mention is slated on 3rd July, 2024.
 - b. That the application and the suit herein is frivolous, vexatious and an abuse of the Court process and should be dismissed with costs in limine.



Factual Background.

2. The Applicant commenced the present proceedings *vide* the Originating Summons dated 26th April, 2024 where he seeks the determination of the following questions;
 - a. Whether the Applicant is entitled to 2.3 acres of land comprised in Kericho/Kiptere/3097 and Kericho/Kiptere/3098, registered in the names of Alfred Kipkemoi Meter (sic) (the 1st Respondent herein), and David Kimutai Metet (the 2nd Respondent herein), both parcels being resultant portions of Kericho/Kiptere/3097, by virtue of the Applicant's adverse possession of the same in open, quiet and peaceful occupation for a period of almost fifty (50) years now.
 - b. Whether the Applicant should be registered as the proprietor of the portion measuring approximately 2.3 acres comprised in the land parcels Kericho/Kiptere/3097 and Kericho/Kiptere/3098 registered in the names of Alfred Kipkemoi Metet (the 1st Respondent herein), and David Kimutai Metet (the 2nd Respondent herein) both parcels being resultant portions of Kericho/Kiptere/1484.
 - c. Whether the 1st and 2nd Respondents should be ordered to execute the transfer the transfer (sic) and all the requisite forms and perform all acts necessary to effect registration proprietor (sic) of the said 2.3 acres, and in default, the Deputy Registrar of the Court be authorized to execute them.
 - d. Whether or not the Applicant is entitled to an order of permanent injunction restraining the Respondents. Their agents (sic), employees from entering, cultivating, occupying, trespassing, alienating, transferring and/or in any other matter (sic) adversely dealing with the Applicant's portion measuring 2.3 acres aforesaid.
 - e. Whether an order do issue that the Officer Commanding Station (OCS) Kabianga Police Station oversees the enforcement and compliance with this orders.
 - f. Whether the Respondent (sic) should be ordered to pay the costs of this suit to the Applicant.
3. As at the time of writing of this ruling, neither of the parties had filed a response to the Originating Summons.
4. The Applicant also filed a Notice of Motion application dated 26th April, 2024 seeking the following orders;
 - a. That this application be certified urgent and service of summons be dispensed with in the first instance.
 - b. That this application be heard *ex parte* in the first instance.
 - c. That pending the hearing and determination of this suit, there be a stay of ascertainment and fixing of boundaries set for 2nd May, 2024.
 - d. That pending the hearing of this suit, the status quo be maintained with parties adhering to the boundaries as have been on the ground for almost (50) (sic) years now.
5. The application dated 26th April, 2024 came up for hearing on 21st May, 2024 when the 1st Respondent informed the Court that he had filed the preliminary objection under consideration.



6. The Court directed that the preliminary objection be heard first and scheduled it for hearing on 10th June, 2024. The hearing of the preliminary objection was re-scheduled to 18th September, 2024 but was not heard.
7. On 22nd October, 2024 the 1st Respondent was granted leave to file a Replying Affidavit in support of the preliminary objection and the hearing of the preliminary objection was adjourned to 13th November, 2024.
8. On 13th November, 2024 the Court issued directions that the preliminary objection be heard by way of written submissions. It was mentioned on 28th January, 2025 to confirm filing of submissions and then reserved for ruling.

The 1st Respondent's Contention

9. The 1st Respondent filed a Replying Affidavit sworn on 11th November, 2024.
10. He contends that he read the Applicant's application dated 26th April, 2024 and he is vehemently opposing it.
11. He also contends that he instructed his advocates on record to file *CM ELC Misc. Application No. E25 of 2023*.
12. He further contends that in the said application he sued the Applicant herein and sought, among other orders, an order restraining him (Applicant) and any other person acting on his behalf from preventing the intended re-establishment of boundaries of land parcel No's Kericho/Kiptere/1486, 3097 and 3098 by the Land Registrar Kericho.
13. It is his contention that the said application is still pending in Court and was slated for mention on 13th November, 2024.
14. It is also his contention that the Applicant herein and his counsel is aware of the pending application before the subordinate Court.
15. It is further his contention that the parties in the present suit and the suit pending before subordinate Court are the same except for the 3rd Respondent. He goes on to state that the inclusion of the 3rd Respondent in the present proceedings is a ploy by the Applicant to further delay the matter.
16. He contends that he has been advised by his advocates on record that the present suit is sub judice and constitutes an abuse of the Court process.
17. He also contends that the Applicant is aware of the pending proceedings as the Court issued an order on 2nd September, 2024.
18. He further contends that the Applicant acknowledges that in the year 2022, they tried to undertake a similar exercise which was unsuccessful as the Land Registrar ordered the complainant to present his case in Court and for the Court to issue an order to the Registrar and the Surveyor to determine the boundary issue.
19. It is his contention that he has been advised by his advocates on record that the Applicant has not met the threshold for orders of stay of execution of the order issued by the Court. (sic)
20. It is also his contention that the Applicant has the option of appealing against the decision of the subordinate Court.



21. He ends his deposition by stating that the present suit is fatally defective, incompetent and ought to be struck out.

Applicant's Response.

22. The Applicant filed a Supplementary Affidavit sworn on 16th September, 2024.

23. He deposes that the application dated 26th April, 2024 does not offend the Provisions of Section 6 of the Civil Procedure Act. He goes on to state that the 1st Respondent in his preliminary objection dated 13th May, 2024 contends that the suit is sub judice as the issue of boundary re-establishment was dealt with in *Kericho CM ELC Misc Application No. E025 of 2023*.

24. He also deposes that in *Kericho CM ELC Misc Application No. E025 of 2023*, the 1st and 2nd Respondents are seeking an order of re-establishment of boundaries. He adds that it is a miscellaneous application and not a substantive suit as it does not seek for the determination of any ownership dispute and neither does it raise a substantive claim of adverse possession.

25. He further deposes that the 1st and 2nd Respondents learnt of the present proceedings and opted to re-open their application which had been filed before the Magistrate's Court through an application seeking to review and/or vary the initial order. He goes on to state that the 1st and 2nd Respondents are also seeking to have both the Kericho Land Registrar and County Surveyor be ordered to proceed with the intended boundary re-establishment and amendment of the register.

26. It is his deposition that the present suit raises a claim of adverse possession and that it would be just and fair that it be considered substantially and determined on its merits.

27. He ends his deposition by urging the Court to stay the intended process of boundary re-establishment as there is now an ownership dispute.

Issues for Determination.

28. The 1st Respondent filed his submissions dated 19th December, 2024 while the Applicant filed his submissions dated 29th January, 2025.

29. The 1st Respondent in his submissions submits on the following issues;

- a. Whether the Notice of Preliminary Objection raises a pure point of law.
- b. Whether the instant suit is sub judice.
- c. Whether the instant suit is an abuse of the Court process.

30. With regard to the first issue, the 1st Respondent relies on Section 6 of the Civil Procedure Act, the judicial decisions of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 EA 696, *Republic v Kenya Revenue Authority Ex parte CMC Do Ravenna (Kenya)* [2019] eKLR, *Daniel Kipkemoi Bett & another v Joseph Rono* [2022]eKLR and submits that his preliminary objection raises a pure point of law.

31. The 1st Respondent also submits that he has attached to his replying Affidavit copies of the pleadings filed in *Kericho CM ELC Misc Application No. E25 of 2023*.

32. On the second issue, the 1st Respondent relies on Section 6 of the Civil Procedure Act, the judicial decision of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral*



- Boundaries Commission & 16 Others (Interested Parties)* and submits that it is not disputed that there is a pending suit before the subordinate Court i.e. *Kericho CM ELC Misc Application No. E25 of 2023*.
33. He also submits that it is further not disputed that the subject matter in both suits is the same and the orders sought i.e. stay of execution of the orders issued on 2nd September, 2024 are the same. (sic)
34. He further submits that it is evident that the suit that was filed in the subordinate Court was filed one year prior, that it is still pending hearing and determination and that the parties in both suits are the same.
35. He submits that the jurisdiction of the Chief Magistrate's Court is not disputed and relies on the judicial decision of *David Ndi & others v Attorney General & others* [2021]eKLR in support of his submissions.
36. With regard to the third issue, the 1st Respondent submits that if the Court finds that the present matter is sub judice, then it follows that it constitutes an abuse of the Court process.
37. The 1st Respondent relies on the judicial decision of *Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya* [2020]eKLR and urges the Court to strike out the Applicant's suit and application with costs.
38. The Applicant submits on the following issues;
- a. Whether the Notice of Preliminary Objection meets the threshold required to sustain a preliminary objection.
 - b. Who should bear the costs of the preliminary objection?
39. On the first issue, the 1st Respondent relies on the judicial decisions of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (EA 696), *Kyule v Gitaari* (Civil Appeal 217 of 2023) [2024] KEHC 5819 (KLR) (23 May 2024) (Ruling), *Margaret Wachu Karuri v John Waweru Ribiro* [2021] KEELC 2793 (KLR), *Business Partners International Kenya (II) Limited v Rudufu Limited & 2 others* (Miscellaneous Application E027 of 2023) [2023] KEELC 22458 (KLR) (20 December 2023) (Ruling) and submits that a preliminary objection cannot be sustained if there are facts to be ascertained.
40. The Applicant submits that the preliminary objection under consideration is premised on the ground that the matter is sub judice.
41. It is the Applicant's submissions that this calls for the Court to examine the issues raised in *Kericho CM ELC Misc Application No. E025 of 2023* and determine whether they are the same as the issues raised in the present suit.
42. It is also the Applicant's submissions that on that ground alone, the Court should dismiss the 1st Respondent's Preliminary Objection.
43. The Applicant submits that the issues raised in the present suit relate to the ownership of the suit properties while the issue raised in *Kericho ELC Misc Application No. E025 of 2023* is on ascertainment and fixing of boundaries.
44. The Applicant also submits that the matter before the subordinate Court does not seek for determination of the apparent ownership dispute.
45. The Applicant further submits that the two matters are distinct as they raise different issues though they relate to the same property.



46. On costs, the Applicant relies on Section 27 of the *Civil Procedure Act* and urges the Court to dismiss the 1st Respondent's Preliminary Objection.

Analysis and Determination.

47. I have considered the 1st Respondent's Preliminary Objection, the various affidavits filed and the rival submissions. The only issue that arises for determination is whether the 1st Respondent's Preliminary Objection has merit.

48. The judicial decision of *Ushago Diani Investment Limited v Abdulwahab* (Environment & Land Case 12 of 2023) [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling) cited with approval *Oraro v Mbaja* [2005] eKLR 141 where the Court, on the nature of preliminary objections, held as follows on;

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.” (Emphasis mine).

49. Section 6 of the *Civil Procedure Act* 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.”

50. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) held 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.” (Emphasis mine).

51. The 1st Respondent’s preliminary objection is on the ground that the Applicant’s application dated 26th April, 2024 is sub judice as it raises issues of boundary re-establishment which issue is also raised in *Kericho CM ELC Misc Application No. E025 of 2023* which is still pending before the subordinate Court.
52. In response, the Applicant admits that *Kericho CM ELC Misc Application No. E025 of 2023* was filed before the subordinate Court and the issues raised in the said suit relate to boundary re-establishment.
53. It is however the Applicant’s contention that the present proceedings are not sub judice as they raise issues of adverse possession.
54. The Applicant also contends that the preliminary objection raises the issue of sub judice which issue requires the Court to interrogate facts and that this goes beyond the scope of a preliminary objection.
55. It is important to note that the Applicant’s Originating Summons application dated 26th April, 2024 raises a claim of adverse possession.
56. It is also important to note that the Applicant’s Notice of Motion application also dated 26th April, 2024 seeks among other orders, an order staying ascertainment and fixing of boundaries.
57. It is evident that the 1st Respondent’s preliminary objection is specific to the issue of boundary re-establishment as set out in the application dated 26th April, 2024
58. This distinction is necessary because both the Applicant and the 1st Respondent have submitted on whether the issues raised in the Originating Summons are sub judice and yet the issue of boundary re-establishment has only been raised in the Notice of Motion application.
59. It is the Applicant’s contention that a preliminary objection on the ground of sub judice cannot be sustained as facts have to be ascertained.
60. In the judicial decision of *Onyango v Ochiemo* (Environment & Land Case E008 of 2022) [2023] KEELC 18938 (KLR) (18 July 2023) (Ruling) the Court held as follows;

“The issues raised by the defendant are that this suit is both sub-judice and res-judicata. Those are pure points of law provided for under Sections 6 and 7 respectively of the *Civil Procedure Act*. Clearly therefore, this is a proper Preliminary Objection as defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (supra)*.” (Emphasis mine)
61. As was held in the above cited judicial decision, sub judice is a pure point of law and it can be determined in a preliminary objection. I shall, therefore, proceed and determine the preliminary objection on its merits.
62. The Supreme Court in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* (*supra*) cited above held that a party seeking to invoke the doctrine of sub judice must establish that there is more than one suit filed over the same subject matter, that the said suits are between the same parties and that both suits are pending before Courts of competent jurisdiction.
63. It is not disputed that *Kericho CM ELC Misc Application No. E025 of 2023* was filed in the subordinate Court. It is also not disputed that the said proceedings were commenced by the 1st and 2nd Respondents



vide the Notice of Motion application dated 8th May, 2023. The said application is attached to the Applicant's Supplementary Affidavit. A perusal of the application shows that the 1st and 2nd Respondents sought the following orders;

- a. That this Application be certified urgent and be heard forthwith and ex-parte in the first instance.
- b. That this Honourable Court be pleased to restrain the Respondent and any other person acting on his behalf from preventing or any other way interfering with the intended boundary re-establishment of Kericho/Kiptere/1486 v 3097 and 3098 by the Kericho Land Registrar pending hearing and determination of this application.
- c. That the Kericho Land Registrar do proceed with the intended boundary re-establishment and proceed to amend the register accordingly.
- d. That the Officer in charge of Kabianga Police Post to assist in the enforcement of this Honourable Court's orders.
- e. That this Court be pleased to grant any other order as it deems necessary.
- f. That the costs of this application be borne by the Respondent herein.

[Emphasis mine]

64. In the Notice of Motion application dated 26th April, 2024 filed in the present proceedings, the Applicant seeks the following orders;

- a. That this application be certified urgent and service of Summons be dispensed with in the first instance.
- b. That this application be heard ex parte in the first instance.
- c. That pending the hearing and determination of this suit, there be a stay of ascertainment and fixing of boundaries set for 2nd May, 2024.
- d. That pending the hearing of this suit, the status quo be maintained with parties adhering to boundaries as have been on the ground for almost (50) years now. [Emphasis mine]

65. This Court notes that in *Kericho CM ELC Misc Application No. E025 of 2023*, the 1st and 2nd Respondents are seeking for an order for the re-establishment of boundaries of the suit parcels.

66. In the application filed in the present proceedings, the Applicant is seeking for an order of stay of a boundary establishment exercise that was scheduled for 2nd May, 2024.

67. It is evident that the said applications are not seeking similar reliefs.

68. Further, the Applicant attached to the application dated 26th April, 2024 an order issued on 28th November, 2023 in *Kericho CM ELC Misc Application No. E025 of 2023*. It is as follows;

“This application dated 8th May, 2023 coming for hearing on 22nd day of November 2023 before Hon. F.M Nyakundi-PM. It is hereby ordered as follows;

1. That the Respondent and any other person acting on his behalf is hereby restrained from preventing or any other way interfering with the intended boundary re-establishment of Kericho/Kiptere/1486 v 3097 and 3098 by the Kericho Land Registrar.



2. That the Kericho Land Registrar do proceed with the intended boundary re-establishment and proceed to amend the register accordingly.
3. That the Officer in charge of Kabianga Police Post to assist in the enforcement of this Honourable Court's orders."

69. From the above, it is evident that the application dated 8th May, 2023 has been determined. A court of competent Jurisdiction has issued orders. Consequently, the application dated 26th April, 2024 cannot be said to be sub judice.

Disposition.

70. Taking the foregoing into consideration, I find that the 1st Respondent's preliminary objection dated 13th May, 2024 lacks merit and it is hereby dismissed with costs.

71. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 10TH DAY OF JULY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Ojwang for Chepkemoi for 3rd Respondent

1st Respondent. Absent

Applicant. Absent

2nd Respondent. Absent

Court Assistant; Mr. Joseph Makori.

