



**Chege & another v Nyamu (Enviromental and Land Originating Summons
E004 of 2023) [2024] KEELC 1558 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

BM EBOSO, J

MARCH 4, 2024

BETWEEN

MUKIRAE CHEGE 1ST PLAINTIFF

THAIRU CHEGE 2ND PLAINTIFF

AND

SOSPETER NG'ANG'A NYAMU DEFENDANT

RULING

1. On 3/8/2023, Mukirae Chege and Thairu Chege [the plaintiffs] initiated this suit through an originating summons dated 1/7/2023. Among other reliefs, they sought a declaration that they are entitled to be registered as proprietors of land parcel number Kabete/ Mwimuto/T.78 under the doctrine of adverse possession. Together with the originating summons, they filed a notice of motion of even date, seeking interlocutory injunctive orders against the defendants.
2. Subsequent to that, the defendant brought a notice of motion dated 11/10/2023, seeking an order striking out the originating summons on the ground that the originating summons was an abuse of the process of the court. The defendant contended that at the time of filing the originating summons, there subsisted another suit involving the same parties and relating to the same subject matter, to wit, Thika ELCLC No E013 of 2023. The said application dated 11/10/2023, by the defendant, is the subject of this ruling.
3. The application was anchored on the grounds set out in the motion and in the defendant's supporting affidavit sworn on 11/10/2023. It was canvassed through written submissions dated 24/10/2023, filed by M/s Kimani & Company Advocates. The gist of the application is that this suit is subjudice, hence an abuse of the process of the court, and should be struck out with costs. The applicant contends that, at the time the plaintiffs brought the suit, there subsisted Thika ELCLC No E013 of 2023; *Sospeter Nganga Nyamu & Albert Karugu Nyamu v Mukirae Chege & 2 others*, through which they sought



eviction orders against the Plaintiffs. The applicant adds that a few days after filing Thika ELCLC No E013 of 2023 and serving papers relating to the suit, the plaintiffs initiated the originating summons herein. It is the applicant's case that the originating summons offends the provisions of Section 6 of the *Civil Procedure Act*. He urges the court to strike out the originating summons.

4. The respondents [the plaintiffs] opposed the application through a replying affidavit sworn on 16/10/2023 by Mukirae Chege and written submissions dated 3/11/2023, filed by M/s Gichuki King'ara & Co Advocates. The respondents' case is that they instructed their advocates to file this suit to pursue their interest in the suit property soon after the Senior Principal Magistrate Court at Kikuyu dismissed a miscellaneous application which the applicants had filed in Kikuyu SPMC Succession Cause No 183 of 2014; In the Matter of the Estate of Nyamu Waitathu. They add that the applicant did not serve them with papers relating to Thika ELCLC No E013 of 2023. They contend that it was only after they served the applicants with papers relating to this originating summons that the applicant's advocates served on them papers relating to Thika ELCLC No E013 of 2023.
5. The respondents contend that the two suits were filed two days apart, adding that their advocates first presented suit papers through an email sent to the court on 2/8/2013 but the Court Registry advised them through a reply email that they needed to file their papers through the e-filing platform. They subsequently uploaded their suit papers on the e-filing platform on 3/8/2023. It is the case of the respondents that there was no mischief on their part in taking out the originating summons, adding that no law bars them from ventilating their claim. They urge the court to reject the application.
6. I have considered the application; the response to the application; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The single question to be answered in this ruling is whether this originating summons stands to be struck out for offending the subjudice principle that is contained in Section 6 of the *Civil Procedure Act*. I will be brief in my analysis.
7. The common law principle of subjudice has been codified by Kenya's Parliament through the enactment of Section 6 of the *Civil Procedure Act* which provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”
8. Suffice it to state that, subjudice is a factual phenomenon that should be established through evidence by the party alleging it. Secondly, the party alleging subjudice has an evidential obligation to demonstrate that the claimant who initiated the offending suit was aware of the preceding suit. Thirdly, where subjudice is established, depending on the circumstances of the case, the court may do one of the following three things;
 - (i) strike out the offending suit;
 - (ii) stay the offending suit pending determination of the preceding suit;
 - (iii) consolidate the two or more suits and hear them together.
9. In the present application, the defendant has invoked the principle of subjudice but has not fully discharged his evidential burden. I say so because, it does emerge from the defendant's supporting affidavit that Thika ELCLC No E013 of 2023 was filed on 31/7/2023. It does also emerge from the court record relating to Thika ELCOS No E004 of 2023 that this suit was filed on 3/8/2023. Between



the two dates is a span of only two days. Given the short span, it was necessary that the applicant demonstrates to the court that the plaintiffs in this originating summons were fully aware of existence of Thika ELCLC No E013 of 2023 at the time they initiated the originating summons.

10. In his supporting affidavit, the applicant failed to demonstrate through evidence that the respondents had been duly served with papers relating to Thika ELCLC No E013 of 2023 by the time they initiated Thika ELCOS No E004 of 2023. In the absence of that critical evidence, the plaintiffs in Thika ELCOS No E004 of 2023 can not be said to have deliberately violated the principle of subjudice. Put differently, the applicants cannot be said to have demonstrated that the respondents deliberately chose to disregard the principle of subjudice as contained in Section 6 of the *Civil Procedure Act*. It is therefore the finding of the court that the applicant has failed to establish that the originating summons herein offends the principle of subjudice and is liable to be struck out on that ground.
11. It does nonetheless emerge from a perusal of the pleadings relating to the two suits that the subject matter in the two suits is the same. The plaintiffs in Thika ELCLC No E013 of 2023 seek eviction orders against three defendants. Two out of the three defendants are the plaintiffs in Thika ELCOS No E004 of 2023. The plaintiffs in Thika ELCOS No E004 of 2023 seek orders of adverse possession against Sospeter Ng'ang'a Nyamu who is one of the two joint plaintiffs in Thika ELCLC No E013 of 2023.
12. Given the above finding and circumstances, the court takes the view that the appropriate order to issue in disposing the notice of motion dated 11/10/2023 is an order consolidating the two suits. The first suit in time shall be the lead file. Costs of the application shall be in the cause.
13. In the end, the notice of motion dated 11/10/2023 is disposed through the following orders:
 - a. Thika ELCLC No E013 of 2023 and Thika ELCOS No E004 of 2023 are hereby consolidated.
 - b. Thika ELCLC No E013 of 2023 shall be the lead file.
 - c. The two consolidated cases shall be heard together by the court currently seized of Thika ELCLC No E013 of 2023.
 - d. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of: -

Ms Wachuka for the Plaintiff

Court Assistant - Hinga

