



Kuria v Wanjohi; Chief Land Registrar (Interested Party) (Environment & Land Case 068 of 2024) [2024] KEELC 1700 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 068 OF 2024**

**JO MBOYA, J
APRIL 4, 2024**

BETWEEN

MICHAEL MBUGUA KURIA PLAINTIFF

AND

JOSEPH KINGORI WANJOHI DEFENDANT

AND

THE CHIEF LAND REGISTRAR INTERESTED PARTY

RULING

1. The Plaintiff/Applicant herein has approached the Honorable Court vide Notice of Motion Application dated the 16th of February 2024 brought pursuant to the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 11 Rule 3; Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules article 159 (2) of the Constitution of Kenya, 2010, and in respect of which the Plaintiff/Applicant has sought for the following reliefs:
 - i.Spent.
 - ii. Pending the hearing and determination of this Application, the status quo over and in respect to the suit property be maintained. For avoidance of doubt, the status quo to relate to the current status and in particular neither the Plaintiff nor the Defendant shall carry out or undertake any excavation, construction and/or development on the suit property in any manner whatsoever and howsoever.
 - iii. Pending the hearing and determination of the Counterclaim in ELC Case No. 275/2024 on 4th March 2024 before Hon Justice Oguttu Mboya, this Honorable Court be pleased to place this matter/file before Hon Justice Oguttu Mboya for appropriate orders/or further directions.



- iv. Pending the hearing and determination of ELC case No. 275 of 2022; Michael Mbugwa Kuriav Joseph Kingori Wanjohi & Another, this Honorable Court be pleased to issue an order for the consolidation of this suit together with ELC Case No. 275 of 2022.
 - v. The Honorable Court be pleased to give directions on filing of defense, documents and Hearing of the two suits as it deems fit, just and appropriate.
 - vi. This Honorable Court be pleased to make such orders as may be necessary.
2. The Application is premised on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the Affidavit of the Plaintiff/Applicant sworn on even date and in respect of which the deponent has annexed two [2] documents thereto.
 3. Upon being served with the Application beforehand, the Defendant/Respondent responded thereto vide a Notice of Preliminary Objection dated the 1st of March 2024 and in respect of which the Respondent has contended inter-alia that the instant suit constitutes and amounts to an abuse of the due process of the court and in any event, same contravenes the doctrine of sub-judice in terms of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
 4. On the other hand, the subject Application came up for Mention on the 4th of March 2024, whereupon the court ordered and directed that the Application beforehand be canvassed and disposed of vide oral submissions. Furthermore, the court thereafter proceeded to and fixed the Application for Hearing on the 12th of March 2024.
 5. Suffice it to point out that the Application indeed came up for Hearing on the 12th of March 2024, whereupon the advocates for the parties, namely, the Plaintiff/Applicant, Defendant/Respondent and the Interested Party, respectively ventilated their submissions to and in respect of the Application under reference.

Parties Submissions:

- a. Applicant's Submissions:
 6. Learned counsel for the Plaintiff/Applicant adopted and reiterated the grounds contained at the foot of the Application dated the 16th of February 2024; as well as the averments in the body of the Supporting Affidavit thereto. Besides, learned counsel also adopted the skeleton submissions dated the 11th of March 2024.
 7. Furthermore, learned counsel for the Applicant highlighted and amplified [4] salient issues for consideration and determination by the Honourable Court.
 8. Firstly, learned counsel for the Applicant has submitted that even though the Applicant herein had hitherto filed ELC Case No. 275 of 2022, the Plaintiff/Applicant's suit at the foot of the previous proceedings was struck out by the court.
 9. Consequently and in this regard, learned counsel for the Applicant has therefore submitted that insofar as the previous suit had been struck out, the question of sub-judice which has been raised and amplified by learned counsel for the Defendant/Respondent does not arise or at all.
 10. In any event, learned counsel has submitted that to the extent that the suit had been struck out and not dismissed on the merits, the Plaintiff/Applicant herein is at liberty to file and/or mount a fresh suit.
 11. Secondly, learned counsel for the Applicant has submitted that where a suit is struck out and not dismissed, the doctrine of res-judicata and res-sub-judice, respectively, do not apply.



12. In support of the foregoing submissions, learned counsel for the Applicant has cited and relied on the holding in the case of *David Omwenga Maobev Republic* (2015)eKLR.
13. Thirdly, learned counsel for the Applicant has submitted that the question of perjury which underpinned the orders of the court striking out the Applicant's previous suit is being dealt with before another forum and hence same cannot be revisited by this Honourable court.
14. Finally, learned counsel for the Applicant has submitted that the instant suit raises similar facts, issues and question of law, which essentially touch on and concern ownership of L.R No. 36/VII/413, which is also [similarly] the subject of ELC Case No. 275 of 2022.
15. To the extent that the issues raised at the foot of the instant suit are substantially similar to the ones highlighted vide ELC No. 275 of 2022, learned counsel for the Applicant has thus submitted that it is appropriate, just and mete to consolidate the two [2] suits and hear same together.
16. Further and in any event, learned counsel for the Applicant has submitted that the consolidation of the instant suit and ELC No. 275 of 2022, would enable the court to deal with all the issues in controversy under one roof and thereby save the precious courts time, which ought to be utilized and/or deployed proportionately.
17. Premised on the foregoing submissions, learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the subject Application is meritorious and thus ought to be granted.

b. Defendant/Respondent's Submissions

18. Learned counsel for the Defendant/Respondent adopted the contents of the Preliminary Objection dated the 1st of March 2024; as well as the skeleton submissions dated the 11th of March 2024, respectively.
19. On the other hand, learned counsel for the Defendant/Respondent thereafter proceeded to and highlighted three [3] salient issues for due consideration and determination by the Honourable court.
20. First and foremost, learned counsel for the Defendant/Respondent has submitted that the Application beforehand is fatally defective and incompetent and hence same ought to be struck out for being an abuse of the due process of the court.
21. Secondly, learned counsel for the Respondent has submitted that the Applicant herein had hitherto filed a similar Application, which Application was heard and dismissed. Consequently and in this regard, learned counsel for the Respondent has submitted that insofar as a previous Application had been heard and disposed of, no similar Application can be filed by the Plaintiff/Applicant or at all.
22. Thirdly, learned counsel for the Respondent has submitted that the issues raised at the foot of the Preliminary Objection are issues of pure law and hence the Notice of Preliminary Objection is sound and legally tenable. In any event, learned counsel for the Defendant/Respondent has submitted that the issues pertaining to the existence of a suit touching on and concerning the same subject matter are duly acknowledged and admitted by the Plaintiff/Applicant.
23. To the extent that the Plaintiff/Applicant herein has admitted and acknowledged the subsistence of a suit touching on the same set of facts, it has been contended that the question of disputed facts in the manner alluded to by the Plaintiff/Applicant is therefore misconceived.
24. Finally, learned counsel for the Respondent has submitted that even though the provisions of Section 6 of *Civil Procedure Act*, Chapter 21 Laws of Kenya only alludes to stay of proceedings, Counsel has



contended that in appropriate cases/situations, the provisions of Section 6 [supra] can also be relied upon to strike out the suit.

25. Consequently and in view of the foregoing, learned counsel for the Defendant has invited the court to find and hold that the instant Application is not only misconceived but same constitutes an abuse of the due process of the court.
 - c. Interested Party's Submissions:
26. Learned counsel for the Interested Party herein has submitted that the Plaintiff herein was privy to and aware of the existence of the previous suit, namely, ELC No. 275 of 2022, which suit was filed by and on behalf of the same Plaintiff/Applicant herein.
27. Additionally, learned counsel for the Interested Party has submitted that to the extent that the Plaintiff/Applicant herein is the one who had filed the previous suit and wherein same remains the Plaintiff, being the one filing the instant suit, indeed contravenes the provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
28. Secondly, learned counsel for the Interested Party has submitted that insofar as the instant suit contravenes and violates the provision of Section 6 [supra], same therefore ought to be stayed pending the hearing and determination of the previous suit, namely, ELC No. 275 of 2022.
29. Finally, learned counsel for the Interested Party has submitted that the provisions of Section 6 [supra] only provide that where any subsequent suit is filed touching on and/or concerning the same set of facts and issues, then such a suit ought to be stayed.
30. Furthermore, learned counsel has submitted that the provisions of Section 6 [supra] do not advert to and/or admit an Application to strike out the offensive suit, either in the manner contended by the Defendant/Respondent or at all.
31. Premised on the foregoing submissions, learned counsel for the Interested Party has implored the court to find and hold that the instant Application, which essentially seeks to consolidate the instant suit with the previous suit namely ELC No. 275 of 2022, is misconceived and thus ought to be dismissed.
32. Conversely, learned counsel for the Interested Party has invited the court to proceed and stay the instant suit pending the hearing and determination of the previous suit which in any event, had also been filed by the same Plaintiff/Applicant herein.

Issues For Determination:

33. Having appraised and reviewed the instant Application and the responses thereto; and upon taking into account the oral submissions ventilated by and on behalf of the respective Parties, the following issues do emerge [crystalize] and are thus worthy of determination:
 - i. Whether the subject suit was filed during the subsistence of another suit touching on and concerning the same subject matter; and if so, whether same ought to be stayed in accordance with the provisions of Section 6 of the Civil Procedure Act, Chapter 21 laws of Kenya.
 - ii. Whether in any event, the Honorable Court ought to consolidate the instant suit with ELC No. 275 of 2022, either as sought or at all.

Analysis And Determination:

Issue Number 1



Whether the subject suit was filed during the subsistence of another suit touching on and concerning the same subject matter; and if so, whether same ought to be stayed in accordance with the provisions of Section 6 of the [Civil Procedure Act](#), Chapter 21 laws of Kenya.

34. It is common ground that the Plaintiff/Applicant herein had hitherto filed and/or lodged ELC No. 275 of 2022 and in respect of which same impleaded the current Defendant/Respondent as well as the Interested Party herein.
35. Furthermore, it is also not lost on the court that upon the filing of the said suit, namely ELC No. 275 of 2022, the court proceeded to and entertained the suit, including granting an order for the maintenance of status quo over and in respect of the suit property.
36. On the other hand, the Defendant/Respondent herein also proceeded to and filed his own suit namely ELC No. 287 of 2022 and in respect of which the Defendant/Respondent also impleaded the current Plaintiff/Applicant and the Interested Party. For the avoidance of doubt, the Defendant/Respondent also laid a claim to ownership of the suit property.
37. Arising from the fact, that both the Plaintiff/Applicant and the Defendant/Respondent had filed separate suits, albeit touching on and concerning the same subject matter, the court proceeded to and issued directions culminating into ELC No. 287 of 2022 being withdrawn.
38. On the other hand, it is also worthy to observe that upon the withdrawal of ELC No. 287 of 2022, the Plaintiff therein [who is the Defendant/Respondent beforehand] was granted liberty to file and serve a Counterclaim in respect of ELC No. 275 of 2022.
39. For the sake of completeness, it suffices to underscore that the Defendant/Respondent herein thereafter proceeded to and indeed filed a Statement of Defense and Counterclaim vide ELC No. 275 of 2022, which had been originated by the current Plaintiff/Applicant.
40. Notably, the said suit, namely ELC No. 275 of 2022 which was filed by the current Plaintiff herein, remains in existence and has not been heard and disposed of. For clarity, the Counterclaim filed by the Defendant/Respondent is indeed pending hearing and determination.
41. In any event, it is also worth noting that the Plaintiff/Applicant herein has indeed filed a Statement of Defense to the Counterclaim and wherein same has denied the claims by and on behalf of the Defendant/Respondent as pertains to ownership of the suit property.
42. Quite clearly, the Plaintiff/Applicant herein was privy to and knowledgeable of the fact that there is in existence a suit [in any event filed by himself] which touches on and concerns the same facts and transactions.
43. Nevertheless, even though the Plaintiff/Applicant is privy to and knowledgeable of the existence of the said suit namely ELC No. 275 of 2022, the Plaintiff/Applicant still had the audacity [brevity] to file and/or originate yet another suit pertaining to and concerning the same set of facts.
44. To my mind, the fact of filing the subsequent suit, namely the instant suit, whilst being alive to the existence of the previous suit which was also filed by the same Plaintiff, constitutes and/or amounts to an abuse of the due process of the court.
45. As pertains to what constitutes and/or amounts to an abuse of the due process of the court, it suffices to cite and adopt the holding in the case of [Satya Bhama Gandhiv Director of Public Prosecutions & 3 others](#) [2018] eKLR, where the court held as hereunder:



24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-
- “A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”
25. Justice Niki Tobi JSC observed:-[16]
- “that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”
46. Additionally, the Court of Appeal also had occasion to consider the import, tenor and scope of the concept of abuse of the due process of the court in the case of *Muchanga Investments ltdv Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, where the court held thus:
- In the Nigerian Case of Karibu-whytie J Sc in *Sarak v KOTOYE* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-
- “The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”
- The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-
- (a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
 - (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
 - (d) (sic meaning not clear))
 - (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”
47. Having found and held that the filing of the instant suit on the face of and during the existence of the previous suit [which similarly filed by the Plaintiff] was improper and an abuse of the due process of the court, the next question that deserves to be answered and/or addressed relates to what should happen to the instant suit.
48. Whereas learned counsel for the Defendant/Respondent has submitted and invited the court to proceed and strike out the suit on the basis of the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, I am however, reluctant to proceed and do so.
49. Instructively, I hold the view that the provisions of Section 6 of the *Civil Procedure Act*, does not advert to and/or admit the striking out of a suit. For coherence, the clear and explicit words deployed by Section 6 [supra] relates to the stay of the subsequent suit and not otherwise.



50. To my mind, if Parliament [National Assembly, as it then were] desired and intended that Section 6 [supra] could be used to strike out a suit, then nothing would have been easier than stipulating as much.
51. Conversely, I hold the view that the provisions of Section 6 [supra] can only be deployed and utilized in appropriate cases, to stay the subsequent suits [proceedings], pending the hearing and determination of the previous suit between the same parties.
52. In this respect, I beg to adopt and reiterate the ratio of the Supreme Court of Kenya [the Apex Court] in the case of *Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, where the court held thus:

(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.

53. Taking into account the foregoing excerpts and coupled with the foregoing wording of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya [supra], I come to the conclusion that the appropriate remedy as pertains to the instant suit would be to stay the proceedings pending the hearing and determination of the earlier suit, which was similarly filed by the same Plaintiff/Applicant.

Issue Number 2

Whether in any event, the Honorable Court ought to consolidate the instant suit with ELC No. 275 of 2022, either as sought or at all.

54. Learned counsel for the Plaintiff/Applicant herein has contended and implored the court to consolidate the instant suit with the previous suit and thereafter to proceed and hear the two [2] suits together.
55. Nevertheless, even as learned counsel for the Plaintiff/Applicant seeks to invite the court to consolidate the instant suit and ELC No. 275 of 2022, the Plaintiff/Applicant is well aware of the fact that the instant matter is fresh [pending filing and exchange of pleadings] whereas ELC No. 275 of 2022 is substantially part heard.
56. To my mind, the two suits, namely the instant suit and ELC No. 275 of 2022, are at different levels and/or stages, which are far apart and thus the instant suit cannot be deployed with a view to drag the hearing and determination of the other matter, which is already ongoing.
57. Remarkably, the invitation by and on behalf of the Plaintiff/Applicant herein is synonymous with a contention that an airplane that has already taken off and is flying at extreme altitude ought to be stopped midair to await for one that is still grounded and is even yet to be flagged off, if at all.
58. In my humble albeit Considered view, the kind of invite [endeavor] attendant to the application for consolidation ought not to be allowed and in any event, same is likely to cause an absurdity.



59. Secondly, it is worth recalling that by the time the Plaintiff/Applicant was filing the subject suit, same [Plaintiff/Applicant] was privy to and knowledgeable of the existence of the previous suit. In any event, the previous suit was filed by the Plaintiff/Applicant.
60. Having filed the current suit during the existence of the previous suit [which constitutes an abuse of the due process of the court], the Plaintiff/Applicant herein now wishes to have the court sanitize this improper conduct by having the instant suit consolidated with the previous one.
61. In my humble view, such kind of an invite constitutes playing hide and seek games with the court. Furthermore, the conduct exhibited by the Plaintiff/Applicant is tantamount to playing lottery with the rule of law.
62. Thirdly, it is not lost on this court that the Plaintiff/Applicant herein was indeed found to have committed the offense of perjury and the issue of such perjury is pending action by the Directorate of Public Prosecution by dint of Article 157 of *the Constitution* 2010.
63. Remarkably, during the pendency of the question of perjury, the Plaintiff/Applicant has ingeniously adopted and deployed a tactic, whose net effect is calculated to circumvent the orders of the court which were made in ELC No. 275 of 2022.
64. To my mind, there are certain conducts, like the one beforehand, which do not meet the threshold set by equity. Indeed, it has been stated times without number that he who seeks Equity must do so with clean and untainted hands and not otherwise.
65. Lastly, it is also imperative to state and underscore that the consolidation of suits is a discretionary relief and can only be deployed by a court of law where the process of the court has been invoked with bona fides and not with ulterior motives or otherwise.
66. In a nutshell, I am of the persuasion that the antecedent conduct of the Plaintiff/Applicant and coupled with the various issues that have been highlighted by the court elsewhere herein before, militates against the exercise of equitable discretion in favor of the consolidation.
67. Premised on the foregoing, my answer to issue number two [2] is to the effect that the Plaintiff/Applicant has neither established nor demonstrated the requisite basis to warrant an order for consolidation, either in the manner sought or at all.

Final Disposition:

68. Arising from the exposition of the law which has been discussed in terms of the preceding paragraphs, it is crystal clear that the court is not inclined to grant the relief sought at the foot of the Application beforehand.
69. To the contrary, the court has come to the conclusion that the Application dated the 16th of February 2024; is indeed devoid and bereft of merits, and thus same be and is hereby dismissed with costs to the Defendant/Respondent and the Interested Party, respectively.
70. Furthermore and taking into account the import and tenor of the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, the court hereby proceeds to and decrees a stay of proceedings in respect of the instant matter pending the hearing and determination of ELC Case No. 275 of 2022.
71. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4th DAY OF APRIL 2024.



OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Okoyo for the Plaintiff/Applicant.

Ms Anjiko h/b for Mr. Abdiziz for the Defendant/Respondent.

Mr. Allan Kamau for the Interested Party.

