



REPUBLIC OF KENYA



**KENYA LAW**  
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**Simon v Adel (Environment & Land Case E006 of 2023)  
[2024] KEELC 1693 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1693 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE E006 OF 2023  
GMA ONGONDO, J  
APRIL 8, 2024**

**BETWEEN**

**MICHAEL OCHOO SIMON ..... PLAINTIFF**

**AND**

**SALMON KWANYA ADEL ..... DEFENDANT**

**RULING**

1. The defendant, Salmon Kwanya Adel through Aluoch Odera & Nyauke Advocates raised a preliminary objection to this suit at paragraphs 8 and 10 of his statement of defence dated 31st May 2023 to the effect that;
  - a. This court is devoid of jurisdiction to entertain the present suit and
  - b. The suit is sub judice.
2. At paragraph 8 of the statement of defence, the defendant stated;

“The content of paragraph 10 of the Plaint is denied as there is a suit before the tribunal being Tribunal Case No E038 of 2023 over the same subject matter, the Tribunal having competent jurisdiction to handle the matter. The defendant shall raise a preliminary objection thereof.”
3. Further, paragraph 10 of the said defence reads;

“The content of paragraph 11 are denied as this issue would be sub-judice to the matter before the tribunal. The defendant shall raise a preliminary objection thereof on the issue of jurisdiction.”



4. On 20th February 2024, the court directed that the preliminary objection be heard by way of written submissions on priority as I subscribe to the Court of Appeal decision in *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others* (2013) eKLR concerning preliminary objections.
5. Accordingly, the defendant's counsel filed submissions dated 21st February 2024 and stated that in Homa Bay ELC Land Appeal No. E005 of 2022, the court directed that the instant dispute be entertained by the Rent Restriction Tribunal in the first instance. That thus, the defendant moved to the tribunal but the plaintiff lodged this suit involving the same subject matter and the same parties. The defendant is seeking eviction of the plaintiff from the suit land and nominal and exemplary damages thereof.
6. By the plaintiff's submissions dated 27th February 2024, reference is made to paragraphs 8 and 10 of the statement of defence, amongst other things. The plaintiff's counsel submitted, inter alia, that the case claim was filed three days after this suit was lodged hence the Tribunal case is sub-judice as provided for under section 6 of the *Civil Procedure Act* Chapter 21 Laws of Kenya. That the Tribunal case and this suit are substantially the same. Counsel relied upon *Kenya Bankers' Association v Kenya Revenue Authority* (2019) eKLR as well as Reference number 1 of 2007; *Secretary-General of the East African Community and Attorney-General of the Republic of Uganda James Katabazi & 21 others v The Attorney General of the Republic of Uganda* and implored the court to strike out or stay the tribunal claim.
7. It is important to note that by a plaint dated 22nd May 2023, the plaintiff represented by Quinter Adoyo and Company Advocates, alleged that he is the true and absolute proprietor of the suit land title No. K/Kalanya/Kanyango/3129 measuring approximately Zero Decimal Zero Six hectares (0.06 Ha) in area. That on 11th May 2023, the defendant illegally gave him an illegal eviction notice of seven days to vacate the suit land thereby ignoring the decision of this Honourable Court in Homa Bay ELC Appeal No. E005 of 2023. That the said notice is a threat to the life and property of the plaintiff hence, precipitating the suit.
8. So, in the suit, the plaintiff has sought thus;
  - a. An order directing the eviction notice dated 11<sup>th</sup> May 2023 is illegal and the same should be quashed.
  - b. An order of declaration that any suit brought by the defendant with regards to K/Kalanya/Kanyango/3129 is res judicata, and the same should not be entertained in court.
  - c. An order directing that the defendants should not in any way interfere with land parcel K/Kalanya/Kanyango/3129 as there is a judgment that was pronounced by this Honourable Court.
  - d. Costs and interest of this suit.
9. The defendant denied the plaintiff's claim by the statement of defence and raised the preliminary objection therein. Therefore, he has prayed that the suit be dismissed with resultant costs awarded to him.
10. In that regard, the issues to resolve are two-fold; whether this suit is sub-judice and whether this court has jurisdiction in respect of the same.
11. This court is not unaware of the meaning of the terms namely "Point of law" and "Sub-judice" in *Black's Law Dictionary* 10th Edition at pages 1344 and 1652 respectively. The principle of sub-judice is housed in section 6 of the *Civil Procedure Act* Chapter 21 Laws of Kenya and the elements thereof are borne in mind accordingly.



12. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696, the Court of Appeal held;

“.....A preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection will dispose of the suit. Examples are an objection to jurisdiction of the court.....”
13. It is common ground that the principle of sub judice is applicable in this dispute. On one hand, the defendant asserted that this suit is sub judice in light of Rent Restriction Tribunal Case No. E038 of 2023 at Kisumu. On the other hand, the plaintiff alleged that the said principle applies to the latter case which should be stayed or struck out.
14. At paragraph 24 of the judgment in Homa Bay ELC Appeal No. E005 of 2021, the court reasoned that it is the Rent Restriction Tribunal which has jurisdiction over the dispute in the first instance. On that strength coupled with Rent Restriction Case No. E038 of 2023 at Kisumu, this suit is sub judice.
15. *Halsbury's Laws of England* 4th Edition Volume 9 at page 350, defines the term “Jurisdiction” as follows;

“.....the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision....”
16. At paragraph 11 of the plaint, the plaintiff stated that this court has jurisdiction in respect of this suit. The defendant stated otherwise at paragraph 10 of the statement of defence and termed this suit sub judice.
17. In *Judicial Commission of Inquiry into Goldenberg Affair & 3 others v Kilach* (2003) KLR 249 at 265/266, it was noted;

“.....the respondent filed the notice of motion in the High Court and the same.....It would not be right for the two matters to be heard simultaneously by the High Court and the Commission.....”
18. As already observed in paragraph 14 hereinabove, this court lacks jurisdiction over the present dispute in the first instance since the same parties and same subject are involved in the Tribunal case. It is well settled that lack of jurisdiction renders a court’s decision void. Indeed, if an act is void, then it is in law, a nullity and will collapse; see *Macfoy v United Africa Company Ltd* (1961) 3 ALL ER 1169 and *Republic v Karisa Chengo & 2 others* (2007) eKLR.
19. In the foregone, the present suit is sub judice and this court is devoid of jurisdiction over it in the first instance. Therefore, the preliminary objection is meritorious
20. The upshot is that I hereby uphold the preliminary objection and strike out this suit with no orders as to costs.
21. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF APRIL 2024.**

**G. M. A ONG'ONDO**

**JUDGE**

Present



- a. Mrs. Nyauke learned counsel for the defendant.
- b. Mr. Jack Otieno instructed by Q. Adoyo learned counsel for the plaintiff.
- c. F. Mutiva, court assistant.

