



**Guyo & 2 others v Mohamed & 6 others (Environment & Land Petition E024 of 2023) [2024] KEELC 4028 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4028 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION E024 OF 2023**

**FM NJOROGE, J**

**MAY 7, 2024**

**BETWEEN**

**WEDO ABADIBA GUYO ..... 1<sup>ST</sup> PLAINTIFF  
MOHAMED DADO HATU ..... 2<sup>ND</sup> PLAINTIFF  
MAHDI ABDIKADIR AHMED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ABASS MOHAMED ..... 1<sup>ST</sup> RESPONDENT  
MOHAMED BARRE DOKATA ..... 2<sup>ND</sup> RESPONDENT  
DIRECTOR OF LAND & ADJUDICATION, TANA RIVER  
COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**THE COUNTY SURVEYOR, TANA RIVER ..... 1<sup>ST</sup> DEFENDANT  
DIRECTOR OF PHYSICAL PLANNING, TANA RIVER  
COUNTY ..... 2<sup>ND</sup> DEFENDANT  
CHIEF OFFICER, LANDS AND PHYSICAL PLANNING TANA RIVER  
COUNTY ..... 3<sup>RD</sup> DEFENDANT  
THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application for determination is dated 9<sup>th</sup> October 2023. It was filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It seeks the following orders: -

1. ....(spent);



2. That the plaint dated 18<sup>th</sup> September, 2023 filed by the Plaintiffs be struck out on account of being sub-judice and for being otherwise an abuse of court process;
  3. That this honourable court be pleased to bar the Plaintiffs from instituting any further habitual suits in respect to the suit property;
  4. That the costs of this application be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/applicants herein.
2. The application, which was brought pursuant to Sections 1A, 1B, 3A, 7 and 8 of the Civil Procedure Act and Articles 48, 50 and 159 (2) (d) of the Constitution of Kenya, is premised on the grounds on the face of the motion and supported by the attached affidavit sworn by the 1<sup>st</sup> Defendant on 9<sup>th</sup> October 2023.
  3. According to the 1<sup>st</sup> Defendant, the suit property herein identified as land demarcated under PDP No. 196037S is similar to that in another suit filed by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein as Land Case No. E003 of 2023 Tana River Human Rights Activists, Mohamed Dado & Mahdi Abdikadir Ahmed v Abass Mohamed; and Department of Lands and Physical Planning, Tana River County (interested party) (hereinafter “the Garissa suit”).
  4. The 1<sup>st</sup> Defendant deposed that on 25<sup>th</sup> September 2023 the court in Garissa issued orders to maintain status quo which are still in existence considering that the notice of withdrawal filed therein by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs on 28<sup>th</sup> September 2023 is yet to be endorsed. To the 1<sup>st</sup> Defendant, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are only forum-shopping and wasting judicial time by filing multiple suits with the intention of obtaining parallel orders geared to confuse the ultimate execution process.
  5. Pursuant to this court’s directions, the application was served upon the 1<sup>st</sup> Plaintiff on behalf of all the Plaintiffs via email on 11<sup>th</sup> October 2023, as seen in the affidavit of service sworn by Ms. Barke Bujra on 11<sup>th</sup> October 2023. There was no response from the Plaintiffs. The application is therefore unopposed.
  6. The Black’s Law Dictionary defines “sub judice” to mean “before a court for determination...”. The doctrine of res sub-judice prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same as that in a previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. Section 6 of the Civil Procedure Act provides that:-
 

“..... No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”
  7. Going by what has been presented before this court, the Garissa suit filed on 28<sup>th</sup> August 2023 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs against the 1<sup>st</sup> Defendant relates to some parcel of land measuring 36.62 Ha situated in Saka/Mulanjo Village within Tana River County and demarcated under PDP No. ARC196037S. The Plaintiffs’ grievance in that suit is that the 2<sup>nd</sup> Plaintiff is the rightful owner of the said property having purchased the same from the community vide a sale agreement dated 26<sup>th</sup> May 2021. They want the 1<sup>st</sup> Defendant evicted from the said property and a permanent injunction issued against him.
  8. Looking at the present suit which the Plaintiffs instituted on 21<sup>st</sup> September 2023 vide a Plaint dated 18<sup>th</sup> September 2023, the dispute between the parties is over a parcel of land identified as “Wakole Farm” measuring approximately 36.62 Ha demarcated under PDP No. 196037S. To me, the subject matter herein is substantially the same as in the Garissa suit. The reliefs sought are equally similar and



the main parties substantially the same. The issue is whether the Garissa suit is still pending, bearing in mind that a notice of withdrawal was filed therein. To the 1<sup>st</sup> Defendant's counsel, the notice of withdrawal is yet to be endorsed, and is therefore of no effect as at present.

9. Order 25 of the [Civil Procedure Rules](#) provides for withdrawal of suits as follows:
  - (1) At any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
  - (2) (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn upon the filing of a written consent signed by all the parties.
  - (2) Where a suit has been set down for hearing, the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit and otherwise, as are just.
10. It follows therefore that the right to withdraw a suit under Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. However, under Order 25 Rule 2 withdrawal where a suit has been set down for hearing requires consent of the parties and or permission of the court; and the withdrawal may be subject to terms that the court considers just, including payment of costs or filing of any other suit.
11. In the present case, and with the material placed before me, it is clear to me that the Garissa suit has not been set down for hearing. What was slotted for hearing was the interim application for temporary injunction. It must be noted that under Order 25 Rule 1, the Notice of Withdrawal takes effect upon service of the same on all parties in the suit where the suit has not been set down for hearing. The 1<sup>st</sup> Defendant and applicant in the present application, did not contest service of the notice of withdrawal of the Garissa suit. In the circumstances, I am convinced that there was no basis for further endorsement of the notice of withdrawal of suit, as pleaded by the 1<sup>st</sup> Defendant. Given the provisions of Order 25 as to the liberty to file a new suit and that the withdrawal should not afford a defence to the new suit, a blanket order made herein barring the plaintiffs from filing new proceedings would be improper.
12. In this court's considered opinion, the notice of withdrawal filed in the Garissa suit on 28<sup>th</sup> September 2023 is effective. This means that the Garissa suit ceased to exist and in turn the doctrine of res sub judice in this case cannot be applicable.
13. The outcome is that the application dated 9<sup>th</sup> October 2023 is unmerited and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 7TH DAY OF MAY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

