



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fondo (Suing as the legal representative of the Estate of Kahindi Gona  
Fondo - Deceased) v Ajulu & 10 others (Environment & Land Case  
285 of 2017) [2024] KEELC 6918 (KLR) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 285 OF 2017**

**LL NAIKUNI, J  
OCTOBER 14, 2024**

**BETWEEN**

**KATANA KAHINDI FONDO (SUING AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF KAHINDI GONA FONDO - DECEASED) ..... PLAINTIFF**

**AND**

**NELSON AJULU ..... 1<sup>ST</sup> DEFENDANT  
HASHIM NGOMBO ..... 2<sup>ND</sup> DEFENDANT  
DICKSON MUMBA ..... 3<sup>RD</sup> DEFENDANT  
ABDALLA MWERO ..... 4<sup>TH</sup> DEFENDANT  
IDD JUMA MBULU ..... 5<sup>TH</sup> DEFENDANT  
BAKARI JUMA MBULU ..... 6<sup>TH</sup> DEFENDANT  
RABIA MBATA ..... 7<sup>TH</sup> DEFENDANT  
MWINYI SAID MBULU ..... 8<sup>TH</sup> DEFENDANT  
JUMA SAID MBULU ..... 9<sup>TH</sup> DEFENDANT  
KIBABU JUMAA MBULU ..... 10<sup>TH</sup> DEFENDANT  
HAMISI SAID MBULU ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

## **I. Introduction**

1. This Honourable Court is tasked with the hearing and determination of the Notice of Motion application dated 29<sup>th</sup> July, 2024 by the Nelson Ajulu & 10 Others, the Defendants herein. The



Applicant was brought under the provision of Sections 1A, 1B, 3, 3A and 7 of the Civil Procedure Act, Cap. 21; Order 51 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution of Kenya, 2010.

2. Upon service of the Notice of Motion application to the Plaintiff/ Respondent, the Plaintiff opposed the same through a Replying Affidavit dated 30<sup>th</sup> July, 2024.

## II. The Defendants/Applicants' case

3. The Defendants/Applicants sought for the following orders:-
  - a. Spent.
  - b. That this suit be struck out for being Res Judicata.
  - c. That this Honourable Court be pleased to find that the Plaintiff's continued prosecution of this suit is an abuse of the Court process since the Plaintiff has instituted another suit over the same property L.R. 3633/I/MN, to wit, CMCC (ELC) NO. E079 of 2023 Katana Kahindi v Suleiman Dawati & 4 others, which suit has since been determined.
  - d. That costs of this application be provided for.
4. The application is supported by the grounds, testimonial facts and the averments made under 12 Paragraphed supporting affidavit of M. N. Waweru, an advocate of the High Court of Kenya having the conduct of the matter on behalf of the Defendants herein together with the three (3) annexures marked as "MNW 1 – 3" annexed herein. He averred that:-
  - a. The Plaintiff herein has instituted a similar suit in the lower Court, to wit, "CMCC (ELC) No.E079 of 2023 Katana Kahindi Fondo – Versus - Suleiman Dawati & Others".
  - b. The subject matter in both suits were the parcel of land known as L.R NO.3633/II/MN.
  - c. On 18<sup>th</sup> August, 2023 the Plaintiff obtained a decree in CMCC (ELC)No. E079 of 2023 and has since commenced the execution process.
  - d. In a letter dated 15<sup>th</sup> December, 2023 addressed to Kenya Power & Lighting Company (Hereinafter referred to as "The KPLC"), the Plaintiff applied for power connections to the parcel of land known as L.R. No. 3633/II/MN.
  - e. Annexed to the affidavit were the following documents:-
    - i. "MNW - 1" – Decree in CMCC No.E079 of 2023 dated 18<sup>th</sup> August 2023.
    - ii. "MNW - 2" – Warrants of the Court Bailiff dated 14<sup>th</sup> November, 2023.
    - iii. "MNW - 3" – Letter dated 15<sup>th</sup> December, 2023 addressed to KPLC.
  - f. The suit was Res Judicata since the Civil suit CMCC No.E079 of 2023 had long since been determined.
  - g. It would be an abuse of the Court process by the Plaintiff to allow this matter to proceed in light of the aforesaid averments.
  - h. He prayed that the suit be struck out.
  - i. It was in the interest of justice to allow this application.

DIVISION - III. The response by the Plaintiff.



5. The Plaintiff opposed the Application through a 7<sup>th</sup> paragraphed Replying Affidavit sworn by Katana Kahindi Fondo, the Plaintiff/Respondent herein on 30<sup>th</sup> July, 2024 with two (2) annextures marked as “KFF - 1 to 2”. The 5<sup>th</sup> Defendant deponed that:-
- a. The said application was incompetent ab initio for the following reasons:-
    - i. The affidavit supporting the said application has been sworn by an Advocate who was not a party to the suit and as such it should be struck out limine.
    - ii. This suit was not Res - Judicata to “CMCC ELC No. E079 of 2023 - Katana Kahindi Fondo v Suleiman Dawati, Hamisi Kadi, Ranson Katuu, Mercy Mwakwani and Samuel Kinyua” since the same was pending for hearing and it is coming up for pre-trial directions on 8<sup>th</sup> August, 2024. Annexed and marked as “KKF - 1” the Court Tracking System (CTS) Case Activities of the said Suit in the Lower Court.
    - iii. The alleged annexed Decree and warrants of execution marked as “MNW - 1” and “2” were stayed by the Order of the Court as per the annexed copy of Order marked as “KKF - 2”.
    - iv. The Court Honorable Gathogo Sogomo delivered his Ruling setting aside the Ex-parte Judgement thereof on the 26<sup>th</sup> April, 2024 and thus the alleged Order sought in the present Application dated 29<sup>th</sup> July, 2024 could not issue and ought to be dismissed with costs.
  - b. This Court had in any event supervisory jurisdiction to call for the lower court filed in “CMCC ELC No. E079 of 2023 - Katana Kahindi Fondo v Suleiman Dawati Hamisi Kadi, Ranson Katuu, Mercy Mwakwani and Samuel Kinyua to either consolidate the suit with this present suit or stay the said proceedings in the lower court to await the determination of this Court in this present suit.
  - c. In any event the parties sued in the lower court suit were different from the parties herein and thus, he would be urging the Court to have the said files consolidated so that any decision made before this Honourable Court was also binding on them.
  - d. It was clear that this application before the Honourable Court was just a waste of time and should be dismissed with costs to the Plaintiff to enable this matter proceed to its conclusive determination.
  - e. The affidavit was sworn in opposition to the said Application.

#### **IV. Submissions**

6. On 25<sup>th</sup> July, 2024 while the Parties were present in Court, they were directed to have the Notice of Motion application dated 29<sup>th</sup> July, 2024 be disposed of by way of written submissions. Pursuant to that on 30<sup>th</sup> July, 2024 a ruling date was reserved on 9<sup>th</sup> August, 2024 by Court accordingly.

#### **V. Analysis and Determination**

7. I have considered the Notice of Motion application dated 29<sup>th</sup> July, 2024 lodged by the Defendants and the response by the Plaintiff and the relevant provision of *the Constitution* of Kenya, 2010 and statutes.
8. For the Court to reach an informed, fair and reasonable decision over the subject matter, it crafted three (3) issues which fall for determination herein. These are:-



- a. Whether the suit before this Court offends the doctrine of Sub - Judice under the provision of Section 6 of the *Civil Procedure Act* and the doctrine of Res Judicata under the provision of Section 7 of the *Civil Procedure Act*, Cap 21?
- b. Whether this Honourable Court has the jurisdiction to hear and determine this suit and/or what is the way forward?
- c. Who bears the Costs of the Notice of Motion application dated 29<sup>th</sup> July, 2024.

**Issue No. a). Whether the suit before this Court offends the doctrine of Sub Judice under the provision of Section 6 of the *Civil Procedure Act* and the doctrine of Res Judicata under the provision of Section 7 of the *Civil Procedure Act*, Cap 21.**

9. Under this Sub - heading, the Honorable Court will deliberate on the concept and Doctrine of “Res Judicata” and “Sub Judice” in depth. These doctrines are one that bar a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be “Res Judicata”. The doctrine of Res judicata is provided for under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21 with the object of barring multiplicity of suits and guarantee finality of litigation. It states:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

10. The Doctrine of Res judicata anticipates five (5) conditions that need to co - exist in order to bar a subsequent suit, which are:-



- i. The matter is directly and substantially in the subsequent suit must have been directly and substantially in issue in the former suit;
  - ii. The former suit must have been between the same parties or proxies claiming under them;
  - iii. The parties must have litigated under the same title in the former suit;
  - iv. The former suit was determined by a court competent to try such subsequent suit, and
  - v. The matter in issue must have been heard and finally decided by such court.
11. I have sought refuge from the case of “John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR”, (John Florence decision), where this Court stated as follows:
- “The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”
12. Further in the case of “CK Bett Traders Limited & 2 others v Kennedy Mwangi & another [2021] eKLR”, the court in considering whether the suit was res judicata quoted with approval the views of the court in the case of “The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR”, wherein the court interpreted the role of the doctrine as:-
- “The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
13. For the above conditions to be established, a party pleading Res judicata ought to provide court with the actual pleadings in the former suit. In this case, indeed the Defendants have provided the court with a letter where the Plaintiff clearly states that he had a decree in the Civil Case of “CMCC (ELC) No. E079 of 2023 - Katana Kanindi v Suleiman Dawati & 4 others. The Plaintiff on the other hand has provided the court with a Case Tracking System print out showing that the Ex - Parte Judgment was set aside and the matter was still on going. I am not therefore persuaded that the applicants have demonstrated that this suit is res judicata by dint of the said suit.



14. Under the provisions of Section 6 of the *Civil Procedure Act*, Cap 21 bars any court from engaging in matters “Sub Judice” before them. It 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.”

15. In a recent decision, my brother Justice Mativo discussed the concept of “Sub – Judice” at a sizeable lengthy and which is worth referring to. This was in the case of:- “Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR” where he stated as follows:-

“The Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Blacks law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[22] The situations that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -

- i. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- ii. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
- iii. Where two similar processes are used in respect of the exercise of the same right.
- iv. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- v. Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- vi. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- vii. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.
- viii. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. Abuse of Court process creates a factual scenario where a party is pursuing the same matter by two-Court process. In other words, a party by the two Court process is involved in some gamble;



a game of chance to get the best in the judicial process.[25]A litigant has no right to pursue two processes, which will have the same effect in two Courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this Court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of Court/legal process. It matters not that the earlier suit was filed by the Branch of the LSK while the instant suit is filed by the main body. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.”

16. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in the case of: “Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)”, stated therein as follows: -:

“(67) (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.”

17. For the doctrine of “Sub Judice” to apply the following principles need to be present:
- i. There must exist two or more suits filed consecutively;
  - ii. The matter in issue in the suits or proceedings must be directly and substantially the same;
  - iii. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title; and
  - iv. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
18. The sub - judice rule is meant to prevent Courts of concurrent jurisdiction from contemporaneously entertaining trial of two parallel suits in respect of the same subject matter. For it to apply, it is necessary



that issues in the subsequent suit be also directly and/or substantially the same issues in the other suit. The remedies sought should also broadly be similar.

19. Firstly, the matter in issue should be directly and substantially the same as in the former suit. A close look at the Civil case of:- “CMCC (ELC) no. E079 of 2023 - Katana Kanindi – Versus - Suleiman Dawati & 4 others, the suit property in that matter is the same at the suit property in the instant matter which is L.R. 3633/II/MN which is the property in contention in respect to paragraph 3 of the plaint dated 31<sup>st</sup> July, 2017. I also note in the earlier documents filed by the Plaintiff, he had also filed a suit against the Little Cottage Estates Company Limited and the Registrar of Titles in “Environment & Land Case No. 249 of 2013 and in the Plaint dated 7<sup>th</sup> November, 2013 the suit property in contention was still the one in this suit with a constant Plaintiff. In the Plaint dated 7<sup>th</sup> November, 2013 in Environment & Land Suit No. 249 of 2013 at Paragraph 7, the Plaintiff admitted that there was a suit pending in the Honourable Court touching on the same subject matter, “HCCC No. 175 of 2013, Ali Abdallah Mwachai – Versus – Kahindi Gona Fondo & another still on L.R. 3633/II/MN all suit seeking permanent injunctions as one of their prayers amongst other prayers.
20. The second and third tests are closely intertwined. These are that the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The Plaintiff has been a constant party in all the suit in three of which he was the Plaintiff and in only HCCC 175 of 2013 whereby he was a Defendant.
21. It would be prejudicial to deal with the suit at this point knowing very well the same subject suit is being contested in another competent court which could result to having different outcomes on the same subject suit property which is not proper under the law. To avoid a situation such as the one described above, Parliament in its wisdom enacted the provisions to cater for cases where overzealous parties might run to and from in the corridors of justice so as to mine for the best result in their estimation. In that regard, the provision of Section 5 of the *Civil Procedure Act*, Cap 21 lays the basis for the operation of Section 6 of the *Civil Procedure Act*, Cap 21 by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For this reason, this court having found that it is barred by the operation of law and in particular, provision of Section 6 of the *Civil Procedure Act*, Cap. 21 it lacks the requisite authority to hear and determine this suit.

**Issue No. b). Whether this Honourable Court has the jurisdiction to hear and determine this suit and/or what is the way forward.**

22. Under this sub title, the Honourable Court shall examine the said abuse of the court process on the part of the Plaintiff can be remedied. It is trite that the remedy for a matter that is sub judice is to stay the suit. The Court notes that the matter is fairly old having been instituted on 31<sup>st</sup> July 2017 which is seven years ago and bearing in mind that the court handling “the CMCC ELC No. E079 of 2023 - Katana Kahindi Fondo v Suleiman Dawati Hamisi Kadi, Ranson Katuu, Mercy Mwakwani and Samuel Kinyua” is a subordinate court and that this Court have supervisory advantage over it.
23. Indeed, under the provision of Article 165(3)(a) this Court unlimited original jurisdiction in both criminal and civil matters. The only limitation to this jurisdiction is as provided under the provision of Article 165 (5) of *the Constitution*. Article 165 has further clothed this Court with the jurisdiction to supervise subordinate Courts as follows:
  - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
24. In the exercise of its supervisory jurisdiction, the Superior Court may call for the record of any proceedings before a subordinate Court, as is sought herein, and make any order or give any directions as it deems appropriate. In so doing, the Court must always be guided by the overriding objective, which is to ensure the fair administration of justice.
25. The supervisory jurisdiction of this Court should not be used as a tool for unduly interfering with the exercise of a Court of competent jurisdiction, of its mandate. The Superior Court must also be careful not to be used to curtail the expeditious disposal of suits in subordinate Courts, in the name of exercising its supervisory jurisdiction.
26. This Honourable Court has taken this position in several past cases. In the case of “Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR”, Mwangi, J. listed the following safeguards to be observed by the High Court in the exercise of its supervisory jurisdiction, and I concur:
- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court’s independence in the conduct and management of its proceedings;
  - ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question
  - iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
  - iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
  - v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;
27. Having said that much, I have considered all the above, I am satisfied that the plea of sub – judice has sufficed in this matter. However in their application the Defendant invoked the plea of res judicata and striking out of the suit. Indeed the marginal notes in Section 6 of the *Civil Procedure Act* read “stay of suit”. Since from the CTS extract provided by the Plaintiff the matter in the Civil case of:- “CMCC ELC No. E079 of 2023 - Katana Kahindi Fondo v Suleiman Dawati Hamisi Kadi, Ranson Katuu, Mercy Mwakwani and Samuel Kinyua” in as much as under formal proof terms of civil litigation had been heard and determined ex parte, the ex parte judgment had since been set aside and from where the Court stands the matter had not proceeded to a full hearing et.
28. This Court is satisfied that there are multiple claims which could be perfectly litigated herein and there can be no justification in having multiple cases being heard parallel to each other. Indeed the marginal notes in Section 6 of the *Civil Procedure Act* read “stay of suit”.



29. I wish to refer to the provisions on inherent powers of the Court. Courts seek discretionary powers from these provisions so long as they are exercised judiciously and not capriciously. These are the provision of Section 3A of the *Civil Procedure Act*, Cap. 21 which provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”

30. It is trite law that the provision of Section 3A is applicable by the Courts where there is a vacuum. Section 3A of the *Civil Procedure Act*, Cap. 21 relates to the wide powers of the Court to exercise its discretion to the end of justice between the parties.

31. Likewise, the provision of Section 1A(1) of the *Civil Procedure Act*, Cap. 21 provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Further, the provision of Section 1B(1) of the said Act provides as follows-

“For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

32. There is no doubt that the court has, under Order 11 Rule 1 a discretion to order consolidation on application or suo moto. Order 11 does not state when the application should be made. Ideally it should be made as soon as possible at any rate before any of the suits is heard. In his replying affidavit the Plaintiff raised the issue of consolidation and prayed that the Court use its discretion and consolidate the matters to help in the expeditious determination of the claims.

33. In the case of “Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR”, where the supreme court Stated as hereunder: -

“(39) (The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.

(45) In the circumstances, would it serve the interests of justice to consolidate the appeals in which the parties are the same, and the central issue is the same even if worded differently? The irresistible conclusion is in the affirmative.



We do not see what good would result from denying the applicant’s prayer for consolidation, and allowing each of the appellants to appropriately canvas its cause. The alternative position would result in undesirable delays in concluding a matter of great public interest. It is obvious to us that, in the interests of all parties, the central issue in the appeals ought to be determined expeditiously and conclusively by this Court. Consolidation of the appeals, in our perception, would significantly advance that goal.”

34. This was thought was not a prayer made officially through the correct channel of seeking orders in court. I therefore decline to pursue the issue further.

**Issue No. c). Who bears the Costs of the Notice of Motion application dated 29<sup>th</sup> July, 2024**

35. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
36. In the present case, the Honourable Court reserves the discretion not to award any costs.

**V. Conclusion and Disposition.**

37. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders:-
- a. That the Notice of Motion application dated 29th July, 2024 be and is hereby vacated with the Court thanking the Defendants for bringing into light the multiplicity of cases surrounding the suit property.
  - b. That the suit in “CMCC ELC No. e079 of 2023 - Katana Kahindi Fondo – Versus - Suleiman Dawati Hamisi Kadi, Ranson Katuu, Mercy Mwakwani and Samuel Kinyua” being that it has not been set down for hearing of the main suit is hereby stayed pending the hearing and determination of this suit.
  - c. That the parties are at liberty to move the court as they deem fit and how they want to proceed with the suits.
  - d. That for expediency sake, this matter be and is hereby fixed for hearing on 16th December, 2024.
  - e. That there shall be no orders as to the costs of the Notice of Motion application dated 29th July, 2024.

It is so Ordered Accordingly.

**RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF OCTOBER 2024.**



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**HON. MR. JUSTICE L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, Court Assistant.
- b. Mr. Bosire Advocate for the Plaintiffs.
- c. Mr. Waweru Advocate for the Defendants

