



**Haji & 4 others (Suing for and on behalf of one hundred and sixty residents of Plot Number 232/XVII) v SBS Properties (2016) Limited & 3 others; National Land Commission & another (Interested Parties) (Constitutional Petition 03 of 2022) [2023] KEELC 16880 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16880 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CONSTITUTIONAL PETITION 03 OF 2022**

**LL NAIKUNI, J**

**MARCH 9, 2023**

**BETWEEN**

**ABDILLAHI FARAH HAJI ..... 1<sup>ST</sup> APPLICANT  
KIBIBI YUNUS BASHIR ..... 2<sup>ND</sup> APPLICANT  
MOHAMED JUMA RAJAB ..... 3<sup>RD</sup> APPLICANT  
ARIF KHAMIS GARWAN ..... 4<sup>TH</sup> APPLICANT  
ASHUR SALIM ASHUR ..... 5<sup>TH</sup> APPLICANT  
SUING FOR AND ON BEHALF OF ONE HUNDRED AND SIXTY RESIDENTS  
OF PLOT NUMBER 232/XVII**

**AND**

**SBS PROPERTIES (2016) LIMITED ..... 1<sup>ST</sup> RESPONDENT  
SEIF SAID, LAILA MOHAMED SEIF, SEIF BIN (SUED FOR AND ON BEHALF  
OF THE ESTATE OF SAID BIN SALIM) ..... 2<sup>ND</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT  
HONORABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY  
COUNTY OF GOVERNMENT OF MOMBASA ..... INTERESTED PARTY**



## RULING

### I. Introduction

1. The 2<sup>nd</sup> Respondent/Applicant herein, Seif Said, Laila Mohamed Seif, Seif Bin (sued for and on behalf of the Estate of Said Bin Salim filed moved this Honorable Court through the a Notice of Motion application dated April 8, 2022 was also filed on the same day by way of a Certificate of Urgency brought under Sections 1A, 1B and 3A of the Civil Procedure Rules, 2010 seeking the following orders:

### II. The 2<sup>nd</sup> respondent/applicant's case

2. The 2<sup>nd</sup> Respondent/Applicant sought for the following orders:-
  - a) Spent.
  - b) That the Honorable Court be pleased to set aside, vary, vacate and or discharge the orders and directions issued on April 4, 2022;
  - c) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Notices of preliminary objection dated March 17, 2022 and 18th March 2022 respectively, and the 2<sup>nd</sup> Interested Party's Notice of Preliminary Objection dated March 21, 2022, be marked as withdrawn with no orders as to costs;
  - d) That the respective Notices of Withdrawal of Preliminary Objections filed herewith be deemed as properly filed;
  - e) That the Honorable court be pleased to strike out the Petition dated February 10, 2022 and application of even date on grounds that it offends the doctrine of *Sub Judice* under Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya;
  - f) That the Honorable Court be pleased to strike out the Petition dated February 10, 2022 and application of even date on grounds that it offends the doctrine of estoppel by conduct under Section 121 of the Evidence Act, cap 80 laws of Kenya;
  - g) That the Petitioner bears the costs of the application herein.
2. The Notice of Motion application was premised on the grounds that:-
  - (a) Pursuant to directions issued by the honorable court on April 4, 2022 in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' and the Notices of Preliminary Objection by the 2<sup>nd</sup> Interested party's the 2<sup>nd</sup> Respondent, deemed it imperative to have the said Court's directions be set aside and or vacated and in place directions be taken on the expeditious disposal of the instant application.
  - (b) The Petition herein was "Sub – judice" and offended the provision of Sections 6 of the Civil Procedure Act Cap. 21 in that been made by way of material non - disclosure of material and essential facts thereby making the same fatally defective as there existed another Civil matter being "HCCC Constitutional Petition Number 155 of 2015 - Abdillahi Farah Haji & 28 others v Said Bin Seif (as trustee of Saif Bin Salim Trust) & 4 others which was presently before the Environment and Land Court at Mombasa, Court Number 2 presided by Hon Justice Matheka.



- (c) The integrity of this Honorable Court stood to be compromised with the existence of two Petitions running concurrently in different courts of equal status and with both raising similar issues and claiming ownership of the same properties.
  - (d) It was in the interests of fairness and justice that this Honorable Court do grant the prayers sought.
3. The Application was further premised on the testimonial facts and averments made out under the 16<sup>th</sup> Paragraphed Supporting Affidavit sworn by Mr Kazungu Evans Fiki, an Advocate of the High Court of Kenya and in conduct of this matter on behalf of the 2<sup>nd</sup> Defendant/ Applicants dated April 8, 2022 who averred as follows:-
- a) That the Honorable Court issued directions on April 4, 2022, in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and 2<sup>nd</sup> Interested Party Notices of preliminary objection, to wit that the Preliminary Objection would be canvassed by way of written submissions with leave to all parties to file affidavits.
  - b) That the 2<sup>nd</sup> Respondents being aggrieved with the directions and orders of the Court made on the April 4, 2022, had expeditiously moved a motion under a certificate of urgency seeking to set aside and or vacate the impugned directions.
  - c) That the 2<sup>nd</sup> Respondent was apprehensive that unless the impugned directions and/or orders of the Honorable Court, had rendered the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 2<sup>nd</sup> Interested party's Notices of preliminary objection referred to herein above nugatory and or moot, hence necessitating the instant application seeking to prosecute the aforesaid points of law.
  - d) That the Counsels on record for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 2<sup>nd</sup> Interested party had by consent agreed to withdraw the impugned notices of preliminary objections dated March 17, 2022, March 18, 2022 and March 21, 2022 respectively. Now produced and shown to the Deponent and marked as "Exhibit KEF - 1" were copies of Notices of Withdrawal of Preliminary Objection.
  - e) That the Petition herein was Sub - judice and offended the provisions of Sections 6 of the Civil Procedure Act, cap 21 as it had been made by way of material non-disclosure of material and essential facts thereby making the same fatally defective as there existed another Civil Suit - ELC Constitutional Petition Number 155 of 2015 - Abdillahi Farah Haji & 28 Others v Said Bin Seif (as Trustee of Saif Bin Salim Trust) & 4 others which was presently before the Environment and Land Court at Mombasa, Court number 2 presided by Hon Justice Matheka J (Now produced and shown to the Deponent and marked "Exhibit – KEF - 2" were copies of pleadings in above cited suit.
  - f) That the subject matter in this Petition and that in the other Petition identified above is a claim for ownership of Title Number Mombasa/block XVII/219. Indeed, even the orders sought in the present application and petition are identical to those sought in above stated suit vide their application dated June 22, 2015, which application was determined by the court (Hon Yano J) and by a ruling dated January 14, 2019 the court dismissed the said application with costs to the 2<sup>nd</sup> Respondent in this Petition.
  - g) That further in paragraph I to 55 of the Petition if compared and read together with the pleadings in the said above suit and the grim reality that is the Petition herein shows its face that the issues herein are similar to the issues in the other existing suit.



- h) That the Petitioner had only clothed it as a Petition by including and referencing other properties owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as a means of “forum shopping” in various courts.
4. The issues presented before this court by the Petitioner herein were therefore issues that had been ventilated and canvassed/or are subject of consideration by other courts of competent Jurisdiction.
  5. Therefore, this court entertaining this Petition and the Application herein risked having this court sat as appellate Court and or may lead to there being contradictory orders at the same time with respect to the suit property thereby compromising the integrity of this Honourable Court.
  6. This Petition not only offended but flied in the face of the mandatory provisions of Section 121 of the Kenya *Evidence Act*, Cap 80. By the Petitioner's own admission, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had all along engaged them vide a verbal lease agreement on a house without land basis and the Petitioners could not now purport to challenge the 1<sup>st</sup> and 2<sup>nd</sup> Respondents indefeasible title.
  7. This Petition violated the doctrine of Constitutional avoidance. Several of the issues raised by the petitioners could have been canvassed by way of the Petitioner's filing a regular claim in the Environment and Land court.
  8. The Petition and Application both dated February 10, 2022 were therefore unmaintainable and serves no purpose so far as the issuance of the court orders sought are concerned.
  9. The Petitioners' Petition and Application both dated February 10, 2022 lacks merit and therefore ought to be preemptorily struck out with costs.

### **III. The supplementary affidavit by the 2<sup>nd</sup> respondent/ applicant**

10. In a 10<sup>th</sup> Paragraphed Supplementary Affidavit sworn by Mr Kazungu Evans Fiki he averred as follows:-
  - i. That he is Advocate of the High Court of Kenya practicing as such in the name and style of M/s Lumatete Muchai & Company Advocates, Epic Business Park, 3rd Floor, Links Road, Nyali, PO Box 90565-80100, Mombasa.
  - ii. That the said firm had conduct of this matter on behalf of the 2<sup>nd</sup> Respondent/Applicant herein wherefore he is conversant with the facts of this case hence competent and duly authorized to swear this affidavit.
  - iii. That in addition to the averments contained in the Affidavit in Support of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent/Applicants' Notice of Motion Application dated April 8, 2022, the Applicants hereby wished to bring to the Court's notice the delivery of the Judgment in Mombasa the Civil Case – “ELC PET 155 of 2015 Abdillahi Farah Haji and 28 others v Said Bin Seif & 3 others by Hon. Lady Justice NA Matheka on July 26, 2022. (Annexed hereto and marked as “EFK – 1” is a copy of the Judgment dated July 26, 2022).
  - iv. That he conscientiously reiterated the averments contained in Paragraphs 6, 7 and 8 of the Affidavit in Support of the said Notice of Motion, which depositions were in respect of the fact of the existence of the above said Mombasa Civil Case which suit raised similar issues and was instituted as between same parties over the same subject matter as in the instant suit.
  - v. That in its Judgment of the above stated Civil Suit while acknowledging that the issue at hand concerned the ownership of land and payment of ground rent, went on to find that the Petition



was incompetent and that the Petitioners ought to have invoked the jurisdiction of the ordinary Civil Court.

- vi. That in light of the findings of the Court as highlighted above, he holds the honest view that that the instant Petition shall ultimately meet a similar fate. The present Petition was therefore Res Judicata.
- vii. That the instant Petition violated the doctrine of Constitutional avoidance. Several of the issues raised by the petitioners could have been canvassed by way of the Petitioner's filing a regular claim in the Environment and Land court.
- viii. That the Petition and Application both dated February 10, 2022 were therefore unmaintainable and serves no purpose so far as the issuance of the court orders sought were concerned.
- ix. That Petitioner's Petition and Application both dated February 10, 2022 lacked merit and therefore ought to be peremptorily struck out with costs.

#### **IV. Submissions**

11. The parties while all in court on the 14<sup>th</sup> June, 2022 consented to canvassing the Notice of Motion application dated 8<sup>th</sup> April, 2022 by way of written submissions and a ruling date was set on Notice. Nonetheless, from the records, it is only the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who filed their written submissions.

#### **A. The Written Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

12. On September 26, 2022, the Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the Law firm of Messrs. Obinju Rondo & Company LLP filed their written submissions. Mr Obinju Advocates stated that the central issue in the Applicants' the Notice of Motion dated 8<sup>th</sup> April 2022 (Hereinafter referred to as "The Striking out application") - was whether the Respondent's Petition dated February 10, 2022 (hereinafter referred to as "The Petition") was sub-judice at the time of filing and as demonstrated herein in these submissions. And if the answer to this question was yes, whether this Honourable Court ought to peremptorily strike out the petition with costs. The Applicants contend that the Respondents' Petition was at the point of being filed "Sub – judice" and was now *Res Judicata*, Consequently, this Honourable Court ought to dismiss the petition with costs.
13. The Learned Counsel submitted that the Applicants shall, during these submissions, referred and relied on the supporting affidavit of Evans Fiki Kazungu Advocate sworn on April 8, 2022, his supplementary affidavit sworn on September 22, 2022 and its List of Authorities filed together with these submissions. For ease of reference, relevant portions of the ALOA had been highlighted.
14. The Learned Counsel submitted that at the outset, it was important to point out that the Respondent had neither filed nor served the Applicants with any response to the striking out application. This was despite the directions made by this Honourable Court on June 14, 2022 for filing of responses to the striking out application. In the premises, the striking out application was unopposed and the factual and legal depositions in Mr Kazungu's affidavits (both), sworn in support of the striking out application, are uncontested.
15. The Learned Council submitted that the factual basis and grounds surrounding the striking out application were comprehensively set out in both the Supporting and further Affidavit sworn by Mr Kazungu. He did not propose to rehash them here, save to narrate the salient parts thereof:



- a. The said Petition herein was Sub - Judice and offended the provision of Sections 6 of the [Civil Procedure Act](#), Cap 21 as it had been made by way of material non-disclosure of material and essential facts thereby making the same fatally defective as there existed another Civil suit - ELC Constitutional Petition Number 155 Of 2015-Abdillahi Farah Haji & 28 Others v Said Bin Seif (As Trustee Of Seif Bin Salim Trust) & 4 Others (herein after “The other Petition”) which was before the Environment and Land Court at Mombasa, Court number 2 presided by Hon Justice Matheka J.
  - b. The subject matter in the said Petition and that in the other petition identified above was a claim for ownership of Title Number Mombasa/Block XVII/219. Indeed, even the orders sought in the present application and Petition were identical to those sought in the other petition vide their application dated June 22, 2015, which application was determined by the court (Hon. Yano J) and by a ruling dated January 14, 2019 the court dismissed the said application with costs to the 2<sup>nd</sup> Respondent in this Petition.
  - c. Further under the contents of Paragraphs 1 to 55 of the said Petition if compared and read together with the pleadings in the other Petition, the grim reality that was the said Petition herein showed its face that the issues herein were similar to the issues in the other existing suit.
  - d. On July 26, 2022, the court in the other Petition rendered its Judgement and held inter alia that the other Petition was not sustainable and constituted an abuse of the process of the court and was strike out with costs to the Respondents.
  - e. In applying the dictum of the Court in the other Petition, the said Petition violated the doctrine of Constitutional avoidance. Several of the issues raised by the Petitioners could have been ably canvassed by way of the Petitioner’s filing a regular Civil claim in the Environment and Land court.
  - f. The issues presented before this court by the Petitioner herein were therefore issues that had been ventilated and canvassed by the court in the other Petition and substantively determined. Indeed, the said Petition was now res judicata.
16. The learned counsel submitted that each of these grounds was a sufficient and independent basis upon which, relief should be granted as sought in the striking out application.
  17. The learned counsel submitted that the said Petition was Sub Judice and referred to Section 6 of the [Civil Procedure Act](#) 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.”
  18. The learned counsel submitted that the court in the case of “*Bundotich – v - Managing Director Kenya Airports Authority and another* [2007] 2 EA 90(HCK) gave insight and interpreted very competently the principle of sub judice to wit:-
 

“It would therefore follow that the issue at the core of both this suit as well as the other suit, was the ownership of Land Reference number 209/14824. Obviously, if the plaintiff in the other suit succeeded in having the title to Land Reference number 209/14824 declared a



nullity and thereafter cancelled altogether, it should follow that the plaint herein would have no leg to stand on.”

Either way, the subject matter of both suits remains the ownership of Land Reference number 209/14824. If that issue were to be dealt with before two courts, at the same time, there is every possibility that the courts could reach inconsistent verdicts. If that were to happen, the courts would have been put into disrepute.

Meanwhile, if the two cases were left to run side by side, in two different courts, that would be a waste of precious judicial time. In order to ensure that judicial time is utilized in an optimum manner and also to safeguard the integrity of the judiciary, by removing the possibility that two courts of concurrent jurisdiction might arrive at inconsistent decisions on the same subject matter. I hold that this suit should be struck out. ”

19. The Learned Counsel submitted that from a perusal of the content of the said Petition and affidavit in support herein, it came out clearly that the subject matter of the said Petition and the other Petition was owner of Title number Mombasa/Block XVII/219. The Petitioner had only clothed it as a Petition by including and referencing other properties owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent being Title number Mombasa/Block XVII/232 & Title number Mombasa/Block XVII/1068 as a means of “forum shopping” in various Courts. It was noteworthy that at the point of filing the said petition, the issues raised therein were similar to those raised in the other Petition and as he would demonstrate in the paragraphs below, had already been substantively determined by the court in the other Petition.

20. On the issue of res judicata, the Learned Counsel submitted that the provision of Section 7 of the *Civil Procedure Act*, cap. 21 provided as follows:-

“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.”

21. The Learned Counsel submitted that it was clear from a perusal of the issues raised and pleaded in the said Petition if read and compared with the other Petition; that the Court ( Matheka J) fully applied itself and determined the said issues in its judgement in ELC Constitutional Petition Number 155 of 2015. In its judgement, the court observed that the Respondent's had grossly flouted the doctrine of constitutional avoidance and held “inter alia” as follows:-

“The instant case appears to me to be an issue of ownership of land and whether or not ground rent has been paid ...”

22. The Learned Counsel submitted that the court in ELC Constitutional Petition Number 155 of 2015, quoted with approval a plethora of cases to demonstrate the doctrine of constitutional avoidance and in particular the case of “*Patrick Mbau Karanja v Kenyatta University* [2012] eKLR where Lenaola J (as he then was) stated:-

“I should also say as I conclude: in Francis Waitthaka vs Kenyatta University Petition No. 633 of 2011, this court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this court should not be invoked where other remedies lie...”



23. Lenaola J as stated in the same case that-

“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3)(a) and can be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights.”

24. The Learned Counsel submitted that NA Matheka J in ELC Constitutional Petition Number 155 of 2015 concurred with the views of Lenaola J in the Patrick Mbau Karanja case (supra) and penned off her judgement by concluding as follows-

“...In conclusion, this Constitutional Petition is not sustainable and constitutes an abuse of the process of this court and is accordingly struck out with costs to the Respondents.”

25. The Learned Counsel submitted that they constituted raises similar issues as that in ELC Constitutional Petition Number 155 of 2015, and indeed ought to had been canvassed in an ordinary civil claim. It must therefore meet a similar fate and urge the court to peremptorily strike it out with costs. The Counsel held 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.”

26. The Learned Counsel submitted that indeed, litigation ought to come to an end and urged the court to spare the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. To him, indeed this was Court wastage of time and resources from the nuisance that was the Petitioners persistent filing of pleaders in different fora all the while hoping to obtain outcomes favourable to themselves. He further urged the Court to sanction this behaviour and bring the present proceedings to an end.

27. On the issue of the said Petition being an abuse of process the Learned Counsel submitted that in the case of “*Gideon Moi v Samuel Towett Kibowen* [2018] eKLR, the court cited with approval the dictum of the Court of Appeal in “*Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR as to what constitutes abuse of the court’s process to wit: -

“We must therefore determine if, in the circumstances the Originating Summons as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after Mr Church had admitted that his occupation or possession was based on a tenancy, he still did use the 1<sup>st</sup> Respondent company to file an Originating Summons and claim a purchaser’s interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we



determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1<sup>st</sup> Respondent and Mr. Church did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In *Beinosi v Wyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process. “It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

... The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive.

28. The learned counsel submitted that in light of the foregoing extract, it came out clearly that the Petitioners had full knowledge that there existed another suit in a Court of competent and still went ahead and filed this Petition with the sole intention to circumvent and/or to frustrate the proceedings in ELC Constitutional Petition Number 155 of 2015 by hoping that the Court would reach a different outcome in the present case.
29. In conclusion, the learned counsel held that the upshot was that the applicants had clearly demonstrated that the said petition contravened the doctrine of constitutional avoidance, was res judicata and accordingly urged the court to strike out the petition with costs.

## **V. Analysis and determination**

30. I have given due consideration to the pleadings, the application, and affidavits in support of the motion. I have also carefully considered the written submissions made on behalf of the Applicants and all the authorities cited. Having done so, I find that there are two (2) key issues crystallized from the subject matter for my determination. These are:
  - a) Whether this Court was seized of jurisdiction to hear and determine the Petition and the application on the ground of sub judice.
    - (i) If the answer to issue no. (i) is in the affirmative, whether the petition and the application are incompetent and fatally defective.



(ii) If the answer to issue no. (ii) is in the negative, whether the Applicants is entitled to the interim reliefs sought in the application.

b) Who will bear the Costs of the Application.

**IssueNo. a). Whether this court was seized of jurisdiction to hear and determine the petition and the application on the grounds of sub judice.**

31. Under this Sub heading, the Honorable Court will deliberate on the concept of “*Res Judicata*” and “*Sub Judice*” in depth. These doctrine 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*”. 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.”

32. In a recent decision, my brother Justice Mativo discussed the concept sub judice. 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 paripassu 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.

33. 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 *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*, stated therein as follows: -:

“(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.”

34. 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.
1. 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.
36. Firstly, the matter in issue should be directly and substantially the same as in the former suit. A close look at the Petition dated February 10, 2022, the Petitioners seek from the Court orders that the 1<sup>st</sup> Respondent’s title to be declared null and void, a declaration that the eviction of the Petitioners and a demolition by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent aided by officers of the 3<sup>rd</sup> Respondent is a violation of the right to freedom right to be treated with human dignity and an order of judicial review under Article 23(3)(f) of *the Constitution*. They seek to have a declaration that the subject matter land be vested in the Interested Party and be held in trust all the individuals existing on the subject matter mother land and in physical and actual occupation and/or establishment of a statement scheme and that the property be allocated and be subdivided and titles be issued to the occupants therein.
37. The second and third tests are closely intertwined. 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 parties in Mombasa Constitutional Petition no. 40 of 2015 some of the parties like the first Petitioner in this current suit is the same in the Petition in Court No. 2 presided over by Hon Lady Justice N. Matheka, the 1<sup>st</sup> Interested Party in this suit is the 4<sup>th</sup> Respondent in Petition 40 of 2015, and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this current Petition are the same in the former petition. The current Petition has been filed in respect of Plot Number 219/XVII amongst other plots which was the subject suit property in Mombasa Petition 40 of 2015 as stated in the former Petition dated June 22, 2015.
38. The Civil Suit Mombasa ELC Petition 40 of 2015 has not been decided but is current before my sister’s court, Hon. Lady Justice Nelly Matheka. It would be prejudicial to deal with this Petition at this point knowing very well the same subject suit is being petitioned in another competent court.
39. It is clear that the Petitioners seek to have this suit run concurrently with Mombasa ELC Petition 40 of 2015 which may end up with 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.

40. It is trite that the remedy for a matter that is sub judice is to stay the suit. Having established that this present Petition and application are subject to the doctrine of sub judice, it is immaterial to deal with the other issues raised in the notice of motion application. For that reason the application succeeds as prayed for by the 2<sup>nd</sup> Respondent/Applicant herein.

#### **Issue No b) Who will bear the costs of the application**

41. It is now well established that and from Rule 26 (1) and (2) of *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*, the award of costs is at the discretion of the Cost.

In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.

42. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of *Jasbir Rai Singh Rai v Tarbochan Singh* [2014] eKLR and *Mary Wambui Munene v Ihururu Dairy Cooperative Societies* eKLR [2014])
43. In the instant case the 2<sup>nd</sup> Respondent/Applicant herein has succeeded in protecting its notice of motion application herein dated April 8, 2022 and gotten the orders sought. They are entitled to costs to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Petitioners herein.

#### **VI. Conclusion & disposition**

44. Ultimately, after conducting an elaborate analysis of the issues framed herein, the Honorable Court is fully satisfied that the 2<sup>nd</sup> Respondent/Applicant has been able to successfully establish its case from the Notice of Motion of Application filed herein. Specifically, the Court hereby orders:-
- a. That the Notice of Motion application April 8, 2022 has merited and thus be and is hereby allowed. The Suit before this court is hereby stayed pending the determination of Mombasa ELC Petition No. 155 of 2015. For the avoidance of any doubt, interim orders that were issued on April 4, 2022 are hereby vacated.
  - b. That the Parties are directed to move this Court appropriately within a month of the determination of Mombasa ELC Petition No 155 of 2015.
  - c. That an order be and is hereby made to have this matter mentioned and whereby the Mombasa ELC Petition No. 155 of 2015 shall be placed before this Court on May 10, 2023 for ease of reference and further direction thereof.
  - d. That the costs of the Application shall be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants herein to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Petitioners herein.

It is so ordered accordingly

**RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MARCH 2023.**

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**HON. JUSTICE L. L. NAIKUNI (JUDGE)**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**In the presence of:**

**a. M/s. Yumna, Court Assistant;**

**b. Mr. Egunza Advocate for the Petitioners.**

**c. Mr. Kazungu Advocate for the 2<sup>nd</sup> Respondent.**

**d. M/s. Oweya holding brief for Mr. Obinju Advocate for the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Interested Parties.**

