



**Kihiumwiri Farmers Company v Kungu & 10 others (Environment & Land
Case 2 of 2020) [2023] KEELC 16231 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 2 OF 2020**

**LN GACHERU, J
MARCH 9, 2023**

BETWEEN

KIHUWIRI FARMERS COMPANY PLAINTIFF

AND

MARY GATHONI KUNGU 1ST DEFENDANT
GEORGE KIHOI 2ND DEFENDANT
HANNA NJERI GICHANA 3RD DEFENDANT
PATRICIA WANIRU WAWERU 4TH DEFENDANT
JAMES NGUGI NDIRANGU 5TH DEFENDANT
JOSEPH NGUGI NJUGUNAH 6TH DEFENDANT
ESTHER KAWA 7TH DEFENDANT
NAOMI GOKO 8TH DEFENDANT
BAARIU JOHN 9TH DEFENDANT
JOSEPH KIRIRI 10TH DEFENDANT
REUBEN GAKAMI 11TH DEFENDANT

RULING

1. Before the Court is a Preliminary Objection dated February 25, 2021, filed by the 2nd Defendant on the following grounds:
 1. The Plaintiff claim as drawn does not disclose a reasonable cause of action against the 2nd Defendant;



2. This Honourable Court has no pecuniary jurisdiction to entertain this matter being LR No 13866/29;
 3. This matter is sub-judice and should be stayed in view of ELC No 293 of 2019 (Murang'a Law Court) filed by the Plaintiff on the same subject matter;
2. The Preliminary Objection was canvassed by way of written submissions. The Plaintiff through the Law Firm of Muturi Njoroge & Co Advocates, filed their written submissions opposing the Preliminary Objection on May 31, 2022. They raised one key issue for determination being whether the 2nd Defendant had met the threshold for a Preliminary Objection?
 3. The Plaintiff submits that the suit does not fall under the scope of *sub-judice* as per Section 26 of the [Civil Procedure Code](#), which defines the doctrine of *sub-judice* as follows:

".....no Court shall proceed with the trial of an suit proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings, between the same 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 having jurisdiction in Kenya to grant the relied claimed."
 4. The Plaintiff submits that his counsel erroneously filed a Plaint *vide* ELC 293 of 2019, in the Chief Magistrate's Court in 2019, but later withdrew the same on December 5, 2019.
 5. The Plaintiff relied on the case of [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others](#), wherein the Court restated the purpose of the *sub-judice* rule which 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.
 6. The Plaintiff similarly submitted on the possible argument on the doctrine of *res judicata* as defined under Section 7 of the [Civil Procedure Act](#), which states 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."
 7. The Plaintiff additionally submitted on the doctrine of *res judicata* in the event that the 2nd Respondent raised the issue. He submitted that all suits must come to an end. On this issue he relied on the case of [Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others](#) (2017) eKLR, where the Court held; -

"For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

 - a. The suit or issue was directly and substantially in issue in the former suit;
 - b. That the former suit was between the same parties or parties under whom they or any of them claim;



- c. Those parties were litigating under the same title;
 - d. The issue was heard and finally determined in the former suit;
 - e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
8. The 2nd Defendant filed his written submissions dated February 3, 2023, on February 7, 2023. He raised two issues for determination in which he based his submissions.
 9. On the issue as to whether the Plaintiff’s claim as drawn disclosed a reasonable cause of action, the 2nd Defendant submitted that the Plaintiff is the proprietor of the suit property and that the Defendants have encroached on the it. However, the present suit failed to disclose a cause of action as no allegations were level against the 2nd Defendant, with respect to the suit property yet orders were sought against him. He relied on the case of *DT Dobie & co Kenya (Ltd) v Joseph Mbaria Muchina & Another* (1980) eKLR.
 10. On the second issue as to whether the matter is *sub judice* and should be stayed in view of ELC 293 of 2019, filed by the Plaintiff, the 2nd Defendant relied on the Section 6 of the *Civil Procedure Act*. He further relied on the High Court case of *Nguruman Ltd v Jan Bonde Nielsen & Another* (2017) eKLR, wherein it was held that having similar suits on the same subject matter by the same parties is not permitted.
 11. This Court has reviewed the application and the annexures thereto and concludes that the main issue for determination is whether the preliminary objection is merited?
 12. The 2nd Defendant filed a Preliminary Objection dated February 25, 2021, to the present suit alleging that the Plaintiff’s claim as drawn failed to disclose a reasonable cause of action against the 2nd Defendant; that this Honourable Court has no pecuniary jurisdiction to entertain the matter and that the suit is *sub judice*.
 13. It is trite that for Preliminary Objection to success, it must raise pure points of law as settled in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696, where it was held that:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
 14. A Preliminary Objection can only suffice on pure points of law and does not require of the Court to carry out any investigation of facts for it to stand. As it was rightly stated by the Supreme Court in Application No 50 of 2014 *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR

“Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”



15. The first ground that the Preliminary Objection alleges is that the suit failed to disclose a cause of action. For this Court to determine whether the suit discloses a cause of action against the 2nd Defendant, it would have to investigate the pleadings and make a finding whether indeed a cause of action was disclosed.
16. On the issue whether the suit is *sub judice*, this Court is guided by Section 6 of the [Civil Procedure Rules](#) which states:

“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.”
17. The 2nd Defendant alleges that the Plaintiff filed a similar suit being Murang’a ELC No 293 of 2019, on the same subject matter. To determine whether this is indeed the case, this Court must conduct an investigation on the respective suits and pleading therein, and delve into the material facts of each suit. In *Avtar Singh Bhamra & Another... Vs... Oriental Commercial Bank*, Kisumu HCCC No53 of 2004, the Court held as follows:

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
18. Considering the above, this Court is placed in a position where its asked to rule on a Preliminary Objection despite the Preliminary Objection being based on facts and issues that have yet to be ascertained. This puts the present suit outside the ambit of a Preliminary Objection.
19. In this respect, the Court concurs with the decision in [Henry Wanyama Khaemba Vs Standard Chartered Bank LTD & Another](#) (2014) eKLR, where the Court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”
20. The final ground for the 2nd Defendant’s Preliminary Objection related to the Court’s jurisdiction to hear and determine the present suit. Despite the ground being listed in the Preliminary Objection, the 2nd Defendant later confirmed in their submissions that the Court does have jurisdiction to hear and determine the suit.
21. From the foregoing analysis by the Court, this Court finds and holds that the Preliminary Objection herein fails on all the grounds and the said Preliminary Objection be and is hereby dismissed entirely with costs to the Plaintiff.

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 9TH DAY OF MARCH, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;



Mr Gitari for the Plaintiff

1st Defendant – Absent

Mr Ireri for the 2nd Defendant/Objector

3rd Defendant

4th Defendant

5th Defendant

6th Defendant

7th Defendant Absent

8th Defendant

9th Defendant

10th Defendant

11th Defendant

Joel Njonjo/Mwende – Court Assistants

L. GACHERU

JUDGE

9/3/2023

