



Khamis v Ramadhan (Sued on His Own Behalf as Trustee, Mbale Muslim Mosque Committee Vihiga County) & 3 others (Environment & Land Case E001 of 2023) [2023] KEELC 20577 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE E001 OF 2023**

E ASATI, J

OCTOBER 12, 2023

**IN THE MATTER OF VIHIGA DISTRICT MUSLIM ASSOCIATION AKA
MUSLIM COMMUNITY CENTRE (SUING THROUGH ITS CHAIRPERSON)**

BETWEEN

SHABAN LAHUYA KHAMIS PLAINTIFF

AND

**JUMA RAMADHAN (SUED ON HIS OWN BEHALF AS TRUSTEE, MBALE
MUSLIM MOSQUE COMMITTEE VIHIGA COUNTY) 1ST DEFENDANT**

**ZEBEIR SHOGOBE (SUED ON HIS OWN BEHALF AS TRUSTEE, MBALE
MUSLIM MOSQUE COMMITTEE VIHIGA COUNTY) 2ND DEFENDANT**

NATIONAL LAND COMMISSION 3RD DEFENDANT

THE EXECUTIVE COUNTY GOVERNMENT OF VIHIGA 4TH DEFENDANT

RULING

1. The Plaintiff filed a suit against the Defendants vide the Complaint dated 17th January 2023 over a parcel of land known Kakamega/Bugonda/2187 measuring approximately 0.08Ha claiming that the Defendants conspired and caused the suit land to be registered in favour of the 1st and 2nd Defendants yet it belonged to the Plaintiff.
2. Upon service with Summons to Enter Appearance, the 1st and 2nd Defendants filed Memorandum of Appearance and Notice of Preliminary Objection dated 4th March, 2023 on the grounds that the suit is res judicata Vihiga PMC ELC NO 32 OF 2020, that the suit is fatally and incurably defective and that the suit is an abuse of the court process.



3. Direction were taken 6th June, 2023 that the Preliminary Objection be disposed of by way of written submissions.
4. It was submitted on behalf of the 1st and the 2nd Defendant that the prayers sought in the suit are a replica, word for word, of the prayers in Vihiga PMC EL Case No.32 of 2020. That Section 6 of the Civil Procedure Act provides that the doctrine of sub judice denotes that where a suit is pending before a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on.

Counsel relied on the case of Kenya National Commission on Human Rights –vs- Attorney General, Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) to support the submission.

5. Counsel submitted further that the essence of the doctrine of *sub-judice* is to avoid the possibility of contradicting verdicts by two courts in respect of the same matter and to prevent multiply of proceedings.

Counsel also relied on the case of Thiba Mini Hydro Company –vs- Josephat Kam Ndwiga to submit that it is not the form in which the suit is framed that determines whether it is *sub-judice*, rather it is the substance of the suit and that there can be no justification in having the two cases being heard parallel to each other.

Counsel prayed that the suit be struck out.

6. On behalf of the Plaintiff, it was submitted that a preliminary objection must confine itself to matters of law only and not facts. Where the trial court, in order to determine a Notice of Preliminary Objection has to inquire into facts, look at evidence or use its discretion such a Preliminary Objection is invalid. Counsel relied on the case of Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distribution Ltd (1969) to support the submissions.

That the 1st and 2nd Defendants have not filed defence. That it is pleaded in the plaint that file No. Vihiga PMC ELC No.32 OF 2020 is closed for want of jurisdiction.

7. The Preliminary Objection is based on a sole ground which according to the notice of preliminary objection is that the suit is *res judicata* but in the submissions by the Defendants the suit is *sub-judice*. Though somewhat related, the two doctrines are different and the Defendant ought to have been clearer on which one of them the preliminary objection is based. Nonetheless, firstly, there is no evidence that the said suit in the PM's suit is active and that the pleadings and prayers are the same as the prayers in this suit. Secondly, as held in the case of Mukisa Biscuits (*supra*), for a preliminary objection to succeed it must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained through production of evidence; or if what is sought is the exercise of the court's discretion and must not raise substantive issues from the pleadings which must be determined by the court upon consideration of the evidence.
8. In the instant case, the preliminary objection invites the court to look beyond the pleadings so far filed. The court is being invited to decide on matters of fact as to whether case No.32/2020 VIHIGA PMC EL still exists in court, whether it has been conclusively decided and whether the subject matter and parties and prayers therein are the same as in the present case.

This is, in my view, is beyond the scope of preliminary objections, it is a matter for plenary trial.

9. On these grounds, I find that the Preliminary Objection lacks merit. The same is dismissed. Costs in the main suit.



Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 12TH DAY OF OCTOBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

No appearance for the Plaintiff.

No appearance for the Defendants.

