



**Ita v Nyaga (Environment & Land Case 26 of 2020)  
[2023] KEELC 22514 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22514 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 26 OF 2020  
A KANIARU, J  
NOVEMBER 1, 2023**

**BETWEEN**

**CHARLES NGARI ITA ..... PLAINTIFF**

**AND**

**MURURI NYAGA ..... DEFENDANT**

**RULING**

1. What is before me for determination is a Preliminary objection raised vide a notice dated July 13, 2022 and filed on July 18, 2022. The party objecting – Mururi Nyaga – is the defendant in the suit while the party against whom it is raised – Charles Ngari Ita – is the plaintiff. It is essentially an objection meant to dismiss the present suit for being sub judice and the prayers sought are as follows:
  - a. That the petition is an abuse of court process and is fictitious hence bad in law.
  - b. That there is an existing Siakago Land and Environment case '64 of 2021 filed by the Applicant/Defendant in relation to the subject land herein and therefore this suit should be dismissed.
  - c. Any other reason to be stated at the hearing.
2. The application was responded to *vide* a replying affidavit sworn on 30.05.2023 and filed on 31.05.2023 drawn by the plaintiff - Charles Ngari Ita. He deposed, *inter alia*, that he filed the suit herein through his advocate on record Mogusu & Co. Advocates on 25.08.2020; that he also filed another case at Siakago being ELC 64 of 2021 on 27.07.2021 and the same has not been heard; that he requested his advocate to have the ELC No. 64 of 2021 withdrawn so that he can proceed with the present case; that the Siakago ELC No. 64 of 2021 was withdrawn as per his request; that his claim has not been heard and determined and there is no pending case at Siakago since the said suit was withdrawn; that the suit herein is properly before the court and that the Preliminary Objection should therefore be



dismissed with costs to allow him prosecute his case. He attached a copy of the court order dismissing the suit in evidence.

3. The objection was canvassed through written submissions. The defendant's submissions were filed on March 1, 2023. Whereas the plaintiffs filed his submissions on May 31, 2023.
4. I have considered the objection, the response made to it and the rival submissions. The issue for determination is whether the preliminary objection meets the fundamental threshold of preliminary objection and whether this suit is sub judice.
5. The court in the case of *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties)* [2021] eKLR held the following;

“The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection, if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a “pure point of law”. To discern such 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.

6. From the foregoing, it is apparent that in order for a preliminary objection to hold, it must be demonstrated by the party objecting that there is no contest as to the facts; that the preliminary objection has been raised on a ‘pure point of law’. From the party's pleadings, it is clear that in this case the question of law is whether this suit is sub judice.
7. From an analysis of the party's pleadings, it is not in dispute that the Respondent had filed a similar suit at Siakago, the suit being ELC 64 of 2021. However that suit was withdrawn with costs to the defendant, which is evidenced by a court order.
8. Therefore, on the issue of whether this suit is sub judice

Section 6 of the *Civil Procedure Act* states that:-

“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.”

The defendant has submitted that the objection herein offends the doctrine of sub judice. That the plaintiff has instituted two suits between the same parties pending before courts of competent jurisdiction. The plaintiff has disputed this claim and argued that he withdrew one of the suits filed in Siakago.

9. Sub judice only applies when another suit or proceeding is pending in another court involving the same parties over the same subject matter. Upon perusal of the court order issued on March 27, 2023 by the Principal Magistrate, Siakago, this court is fully satisfied that the case before the said court filed by way



of a plaint dated July 27, 2021 was actually terminated or discontinued by Counsel for the plaintiff. It does not exist and hence it is no longer a pending suit. It can't therefore be used to successfully invoke the doctrine of *sub judice*.

10. An argument may also be raised that raising a preliminary objection is not the proper approach to take where the issue involved is violation of the *sub-judice* rule. One of the cardinal consequences of a preliminary objection is that it has the potential to preliminarily bring a matter to an end. The sub-judice rule however does not bring proceedings to an end. The rule is clear that where violation of *sub-judice* rule is demonstrated, the court should stay proceedings. Stay, by its very nature, implies a temporary halt of proceedings pending some other action. To the extent that the sub-judice rule does not bring an end to proceedings, and bearing in mind that a fundamental aspect of a preliminary objection is to end proceedings, then it is plausible to say that a challenge to a suit or proceedings on the basis of violation of the sub-judice rule needs to be raised via an application or some other suitable court process.
11. In light of all the foregoing, it is clear that the objection raised herein is for dismissal and I hereby dismiss it with costs to the plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

In the presence of Munene for Mogusu for plaintiff and defendant in person.

Court assistant: Leadys

**A.K. KANIARU**

**JUDGE**

**01/11/2023**

