



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 81 OF 2018

MAURICE NASICHE KUDONDO

(Suing as a personal representative of

FRANCIS WASILWA SARATUKI (Deceased).....PLAINTIFF/RESPONDENT

VERSUS

PAILOMENA NAWANGA WASILWA.....1ST DEFENDANT /RESPONDENT

BENARD NYONGESA SARATUKI.....2ND DEFENDANT/RESPONDENT

WEST KENYA SUGAR CO. LTD.....3RD DEFENDANT/RESPONDENT

RULING

(On striking out a Suit for duplicity or being

Sub-judice)

1. The Plaintiff commenced this suit against the Defendants by a plaint dated **15/8/2018** and filed on even date. His claim against the **1st** Defendant was that of fraud in respect to transfer of land parcel No. **Kwanza/Namanjalala Block 5/1** from his deceased father's share which was in the Trans-Nzoia Investment Company Limited to her name. He averred that after the transfer, the **1st** Defendant subdivided the suit land into two (2) parcels being numbers **1748** and **1749** respectively. Subsequently he subdivided parcel No. **1748** further into a further two parcels namely **No. 1752** measuring **7 acres** which was transferred to the **3rd** Defendant and **1755** measuring **19 acres** which remained in her name.

2. His contention was that there were many other subdivisions on the resultant titles all of which he termed fraudulent. He enumerated the particulars of fraud in Paragraph **8** of the Plaint. He stated that the fraudulent acts of the Defendants deprived the rightful beneficiaries of the Estate of the deceased father their rightful inheritance. He stated further that the **1st** defendant had no better title to land measuring **42 acres** excised from the suit land thus the resultant titles ought to be cancelled, the original title restored and transferred to the Plaintiff to hold it in trust for the Estate of the deceased and the rightful heirs and beneficiaries of the deceased.

3. The specific prayers in the Plaint were:

(a) A declaration that the dealings in Land title No. Kwanza/Namanjalala Block 5/1 which resulted in the registration of the 1st defendant as proprietor and the sub-divisions thereof into numbers 1748 and 1749 and later subsequently sub divided into 1752,1753 and 1754 and 1755 with the transfer of 42 acres to the 3rd defendant were procured by fraud.

(b) Cancellation of all sub-divisions and resultant parcels transferred to the 1st and 3rd defendants and the registers hereof be rectified and the same do revert to the original Kwanza/Namanjalala Block 5/1 to be registered in the name of the plaintiff as trustee of the estate of the deceased and the cost of the suit.

4. Parties complied with **Order 11** of the **Civil Procedure Rules** and the matter proceeded for hearing. **PW1** testified on **28/10/2021**. Thereafter, the Defendant brought the instant Application.

The Application

5. The Application was a Notice of Motion dated 26/10/2021 brought by the 1st and 2nd Defendants. It was filed on 28/10/2021. In it, the Applicants prayed:

a) That the Plaintiff's/Respondent's suit against the 1st and 2nd defendants herein be struck out and or be dismissed with costs to the 1st and 2nd Defendants for duplicity and for being an abuse of the court process.

b) That the costs of this application be borne by the Plaintiff/Respondent.

6. The Application was premised on the grounds at its foot and supported by the affidavit of one **Ben Musundi**, an Advocate in conduct of the matter, sworn on 26/10/2021. The affidavit filed on 28/10/2021 more or less repeated the contents of the grounds. He deponed that the suit was an abuse of the court process for the reason that the Plaintiff filed Summons for Revocation of Grant in **Bungoma High Court in Succession Cause No. 18 of 2006** in respect to the Estate of **Francis Wasilwa Saratuki** claiming the interest in land parcel number **KWANZA/NAMANJALALA BLOCK 5/1** (the suit land) which was the same subject matter in the instant Application. He deponed further that the Summons for revocation was for hearing before Honourable Justice Riechi on 6/10/2021 and for mention for further directions on 29/3/2021. He annexed to the Affidavit and marked it as **BM1** a court copy of Summons for Revocation of Grant and Affidavit in Support of Summons for the Revocation of Grant. It was dated 23/4/2021. His contention was that there could not be parallel judicial proceedings litigating over the same issue because it would cause judicial embarrassment if the two suits proceeded separately leading to two different decisions. He stated further that the Respondent lacked the requisite *locus standi* to agitate and/or maintain the current proceedings as a representative of **Francis Wasilwa Saratuki** as Letters of Administration had already been issued to another person. He annexed a copy of Certificate of Confirmation of Grant dated 30/9/2009 and marked it as **BM2**. His case was that the suit was a non-starter, having been founded on the Applicant's misunderstanding that the property belonged to the Estate of **Francis Wasilwa Saratuki** but the Plaintiff/Respondent had not enjoined the Administrator of the Estate to the suit. He faulted the suit as being *malafides*, untenable and ambiguous, and a replica and or duplicitous of the objection proceedings filed in Bungoma High Court in respect to the Estate of the deceased. He accused the Respondent of being a vexatious litigant and a busy body who has had a habit of instituting frivolous and inconsequential pleadings. He prayed that the suit be struck out with costs and the interest be pursued in the Succession Cause in Bungoma. Lastly, he stated that the suit against the 1st and 2nd Defendant's was defective deserving striking out and or dismissal with costs to the 1st and 2nd Defendants.

The Response

7. The Application was opposed. On 26/11/2021, the Plaintiff filed a Replying Affidavit he swore on 24/11/2021. His response was that the present suit was not the same as the **Bungoma High Court Succession Case No. 18 of 2006** where there was the Summons for Revocation of Grant of latter (*sic*) of Administration. His contention was that he filed the Summons in Bungoma for the reason that the instant suit seeks cancellation of titles held by the 1st and 2nd defendants and was not governed by the Law of Succession Act. Again, the parent suit property (suit land) was not included in the schedule of assets in the **Bungoma High Court Succession Case No. 18 of 2006**. He stated that this was the proper forum for litigating against the 1st and 3rd defendants who were holding titles to portions of the suit land and the 2nd defendant who received the proceeds of the sale of the land to the 3rd defendant and his claim for *mesne* profits on behalf of the Estate would be untenable in the Succession Cause. He was particular that the sale and transfer of the suit land to the 1st and 3rd defendants was done without involving the Administratrix of the Estate.

8. On lack of *locus standi*, he stated that, he held a limited grant of latters (*sic*) *ad litem* specific for bringing this action for the benefit of the Estate of the deceased. He attached to the Affidavit a copy of the Grant and marked it as **MNK 1**. He contended that the administratrix abetted the fraudulent dealings against the estate of the deceased and would not be reliable to commence the present suit against the defendants. He then deponed that the allegations of fraud against the defendants would be better heard and determined in the present suit and not a succession cause. He denied the assertion that the suit was duplicitous and offended the law.

9. He termed the Application as a clever way to perpetuate and sustain the fraud which swindled the suit land from the estate of the deceased and it sought their protection from liability in case of adverse orders of this court. He argued that non joinder of a party to a suit was not fatal and that only necessary to (*sic*) parties ought to be joined to a suit. He urged the Court not to strike out the suit due to the non-joinder of the administratrix of the Estate whom he had applied to be substituted with another administrator. He then stated that the Applicants had misapprehended the distinction between this suit and the Summons for Revocation of Grant in the Bungoma High Court Succession Cause.

Submissions

10. This court directed parties to file written submissions towards the disposal of the Application. Both parties filed them. The Applicants filed theirs on 7/12/2021 while the Respondent filed his on 14/12/2021.

Issues, Analysis and Determination

11. I have carefully considered the Application, the Affidavits in support and opposition, the statutes and case law cited as well as the submissions on record. The following issues arise for determination:-

a) *Whether the instant suit was duplicitous in relation to the Summons for Revocation of Grant in Bungoma High Court Succession Cause No. 10 of 2006.*

b) *What orders to issue and who to bears the costs of the Application?*

12. I will analyze the issues one by one here below:

a) Whether the instant suit was duplicitous in relation to the Summons for Revocation of Grant in Bungoma High Court Succession Cause No. 10 of 2006

13. The Applicants' contention was that this suit should be struck out for reason of it being a replica of **Succession Cause No. 18 of 2006** pending for determination before the High Court in Bungoma or for duplicity. The terms of the main prayer, 1, of the Application which presented difficulty in manner it was drafted or framed. I was compelled to dig deeper into the meaning of the word "duplicity" which was used in the prayer. The reason was that nowhere in both the Civil Procedure Act and the Civil Procedure Rules is the terms applied in relation to any issue or matter provided for. Thus, the Court had to understand the mind of the Applicants.

14. However, before I get deeper into the issues, a preliminary observation I make is that the Application before me was supported by an Affidavit sworn by learned counsel yet some of the facts he swore to are contested. While there is no law that expressly bars an advocate from swearing an Affidavit on behalf of his client, doing so is highly discouraged and it is for good reason: leave facts for clients just in case one were to be called to the dock for cross-examination. It has often been stated by Courts and it is good practice that except for arguing points of law it is imprudent for learned counsel to put off his robe of client representation and wade into the waters of presenting a client's facts before a Court of law or indeed any other forum. Counsel's duty is sacred and delineated: it is to present his client's case dutifully to the Court and not to arrogate himself of the position of the client. See the cases of **International Community of Women Living With HIV Registered Trustees v Non-Governmental Organizations Co-ordination Board & 2 others; Teresia Otieno (Proposed Interested Party) [2019] eKLR; A M A A v F S S [2018] eKLR**; and the Court of Appeal case of **Kamlesh Manshuklal Damji Patni v Nasir Ibrahim Ali and 2 Others NAI CA Civil Appl. No. 354 of 2004 [2005] eKLR**, among others.

15. Turning to the prayer for striking out or dismissing the suit for reason of duplicity hence an abuse of the process of the court, the Applicants argued that the cause of action both in the plaint and the Succession Cause touched on a similar subject matter that is Land Parcel No. **Kwanza/Namanjalala Block 5/1** hence this suit suffered duplicity. Duplicity is a term not used in the procedural statute and rules that govern civil matters in this or other Courts of Equal Status. But it is a noun whose adjective is "Duplicitous". Bryan A. Garner in **Black's Law Dictionary, 11th Edition, Thomson Reuters, St. Paul MN, 2019, p. 635** renders their meanings in relation to pleadings as follows: **duplicity** denotes "*The pleading of two or more distinct grounds of complaint or defence for the same issue*". He then defines **duplicitous** to mean "... (of a pleading) *alleging two or more matters in one plea; characterized by double pleading.*" These terms therefore import the idea of the existence of two or more pleadings on the same issue.

16. Duplicity is commonly used in criminal proceedings in regard to charges. However, where used in civil proceedings it has often referred to arguments on a "multiplicity" of suits, for instance, in **Daikyo Japan Motors Ltd & 2 others v Fairuz Feisal Yasin & Fairuz Feisal Yasin & another [2020] eKLR** where her Ladyship was of the view that duplicity would lead to a multiplicity of suits. Where the term multiplicity has been applied it connotes essentially that there is more than one suit by the same parties litigating over the same issue under the same title and that has often imported the argument on the concept of *sub-judice*. That is what I then understood the Applicants mean. They contended that the issues pending before this Court were *sub-judice* in relation to the **Bungoma High Court Succession Cause No. 18 of 2006**.

17. The law governing duplicity of cases and the *sub-judice* rule is stems from the provisions of **Section 6** of the **Civil Procedure Act**. It states 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. This Section is preceded by one - **Section 5** - which gives courts jurisdiction to try all suits of a civil nature except those where they are expressly or impliedly barred. Express bars to courts trying civil suits is the limitation of the courts' jurisdictions that statutes provide for. Implied bars come about by way of such rules of practice and doctrines as the law will recognize. They can be no limit on the implied bars that may exist to jurisdictions of courts. Each case or bar will be considered on its own facts.

19. Then, in terms of the provision cited above, the salient point is that for the rule of *sub-judice* to come into play three conditions must be obtaining. They are that, one, a matter in issue should directly or substantially in issue before the same or another court of competent jurisdiction and that matter in issue before the other court was instituted before; two, the matter in issue is between the same parties or between parties under whom they or any of them claim or are litigating under the same title; and three, the suit is pending or proceeding in that or same Court. The law went a step further to indicate, for obvious reasons including, in my humble view, the fact that the Kenyan the judicial power of the Courts in Kenya is constitutionally derived and exercised within the limits where our Constitution operates, that the courts where such bars contemplated in the Section occur are domestic ones. Our courts' constitutional civil mandate extends to where the Constitution of Kenya curves it to reach. Therefore, parties can as well litigate over the same issues and under the same title in foreign courts if they so wish, while doing likewise in the domestic courts of competent jurisdiction but they must observe that doctrine in the domestic courts.

20. The notion of *sub-judice* has been recently visited and expounded by my brother Justice Mativo in **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** where he stated as follows:-

"...there exists the concept of sub judice which in Latin means "under Judgement." It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in 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. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage."

21. The import of the analysis of the concept is that once a court arrives at the determination that there exists *sub-judice*, it immediately stays the proceedings in the sub-sequent matter until the previous one is heard and determined. And as my brother judge observed, this is for good

order. This was the same position taken by the Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*. The apex Court 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.”

22. I now turn to the facts of the Application before me to the law on the concept of *sub-judice*. According to the Applicant, the suit before this court is also pending before Bungoma Succession Court. A cursory perusal of the Plaintiff and the Summons for Revocation of Grant annexed to the affidavit in support of the Application reveals that the subject matter of both is the one way or other the same parcel of land, that is to say, Land No. **Kwanza/Namanjalala Block 5/1**. However, both matters present slightly different issues on the said subject matter. On the one hand, issue in the Plaintiff is that the Defendant who is the sister to the Plaintiff herein fraudulently got herself registered as owner of the parcel of land in question rather than subjecting it to the accounting of as one of the properties consisting in the Estate of the late father, and then further fraudulently transferred it to the other defendants. On the other hand, the issue that has arisen by way of the Summons for Revocation of Grant in the **Bungoma High Court Succession Cause No. 18 of 2006** is that the grant issued on **30/09/2009** be revoked, the share in Trans Nzoia Investment Co. Ltd of the Plot in Namanjala Farm (which is the subject matter herein) be included as one of the properties of the Estate of the late father to the Plaintiff and 1st Defendant, and Letters of Administration be issued to the Respondent herein. What is common is the subject matter. But whereas that may be the only commonality, if ultimately the grant is revoked and the property included as one of the many that consisted in the Estate, there would be further prayers to be sought in the Succession Cause. That may include the entire issues that are in the instant suit.

23. Moreover, in both matters under reference in the instant Application the parties are not litigating under the same title so as to invoke the rule of *sub-judice*. In this matter, the Plaintiff has sued two siblings namely, the sister, one Pailomena Nawanga Wasilwa and the brother, one Bernard Nyongesa Sitaruki together with a third party allegedly involved in the fraud. But in the Bungoma High Court Succession Cause, he has moved the Court as the Objector against his sister Beatrice Naliaka Situma. Clearly, the parties are neither the same nor litigating under the same title. In addition, the 2nd and 3rd defendants herein are not parties in the Succession Cause. The Applicant herein was economical in the truth over the issues that were raised in the Bungoma Succession Cause after the Summons for Revocation of Grant was filed. For instance, he did not indicate whether or not it was opposed and if so on what grounds or it was consented to, or if she was genuine in her actions that she and the brother (2nd Defendant herein) supported the Summons for Revocation since it would appear part of their father’s Estate was intermeddled. If it was opposed, nothing would have been easier for her to annex to her affidavit the other documents rather than carefully selectively ‘spilling the beans’ as she believed. Had she done so, this Court would have been put into more light as to whether the issues herein were to be ultimately substantially in issue in the Bungoma Succession Cause because after all is said and done the issue is for the Courts to give justice to all and sundry and not to, by way of technicalities, be used to defeat justice. However, granted that the Application in the Bungoma Succession Cause succeeds, as I have said and at the risk of repeating myself, the issues herein and the parties are likely to be the same and litigating under the same title in that matter since many pleadings may be filed thereto.

24. Additionally and to make it clearer, I have perused the title deed attached to the affidavit in support of the Application and compared it with the Plaintiff’s other documents filed in this matter and the evidence that had already been adduced before the instant Application was filed. I find that at the time of transfer of the parcel of land from Trans-Nzoia Investment Limited to the 1st Defendant and subsequently to the 2nd and 3rd defendants, the suit land had not been registered in the name of the deceased. But it was part of the property owned by the deceased before his demise. Unless otherwise expressly found to have been specifically to be legally excluded from his assets it should have been part of the properties to be taken into account during the Succession proceedings.

25. It is worth noting that this suit was filed on **15/08/2018**. The Bungoma High Court Succession Cause was filed in **2006**. Of peculiarity is that the suit land is said to have formed part of the Estate of the late Francis Wasilwa Sitaruki Achuti who owned it as a share in Trans Nzoia Investment Co. Ltd even though it had not been registered in his name and was excluded from the list of assets named in the Bungoma Succession Cause when it was filed and concluded. As to whether it was by design or inadvertent is a matter of evidence, which is in issue herein and might be the same in the Bungoma High Court Succession Cause. If the averment on the fact of the property having formed part of the Estate of the deceased is true, then it is a matter that should be handled by the High Court in the Succession proceedings, and to that extent this Court would not have jurisdiction to deal with the issue. As is clear from Annexure **BM 1** the Summons for Revocation of Grant was filed in Bungoma High Court in **April, 2021**. It goes without saying that the instant suit was filed prior to the Summons for Revocation.

26. One of the preliminary questions that arises is, when then if true did it become duplicitous vis-à-vis the proceedings in the Succession Cause? It can only be when the Respondent herein drew attention to the Court in the Bungoma High Court Succession Cause, by way of the Summons for Revocation of Grant that the suit land herein existed “out there” in that Cause and should have been taken into account as part of the properties of the deceased in the proceedings that led to the issuance of the Confirmed Grant issued on **30/09/2009**. The answer I have provided leads this Court to note first that this suit has been heard partly, and then make a finding that it is obvious that to the extent that the Respondent herein did raise not the question of revocation of the grant, the Applicants were happy to proceed with the suit herein. But, three years after the institution of the suit, since he raised the issue, he designed a device by way of this Application to scuttle the evidence that came out about the issues in controversy in this matter. Be that as it may, the issue of a property which is alleged to have been part of the Estate of the late Francis Wasilwa Saratuki Achuti and which is alleged to have been transferred to other parties by fraudulent means still outstands. It appears so far that the Administratrix of the Estate is either disinterested in following up the issue of the property left out of the ones she was supposed to administer or she knows and consents to how its status changed. But that is a matter that would be properly dealt with by the Court with the jurisdiction to handle the issues to do with the Estate. As stated above, although the issues in this suit were brought before the Court in **2018** about three years before they in part became issues in the Bungoma High Court Succession Cause, the said Succession Cause and proceedings therein were before the Court since **2006**. Thus, this Court treats the issues which are common in the two

matters as having been before the Court earlier in that Succession Cause. In sum, that is how the issues herein became *sub-judice* in relation to the Bungoma High Court Succession Cause. In conclusion, I find that it would not be prudent and in the interest of justice to strike out or dismiss the suit as prayed for in the instant Application. Instead, I find and direct as discussed above that the suit herein be stayed pending the hearing and determination of the Summons for Revocation of Grant is **Bungoma High Court Succession Cause No. 18 of 2006**. I also would direct that since the issues herein are *sub-judice* in relation to the Succession Cause, for good order, consistency and monitoring of the proceedings herein lest the suit falls out of the tracking system this file is hereby transferred to the Bungoma High Court Registry to for it to be mentioned alongside the Succession Cause file for further orders and final determination or until the Court orders otherwise.

27. For the reasons that I have comprehensively expressed myself on the issue of *sub-judice* and directed that this suit be stayed pending the herein and determination of the **Bungoma High Court Succession Cause No. 18 of 2006**, I find it an academic exercise to engage my mind on the issue whether or not the Plaintiff had *locus standi* to bring this suit. I therefore leave the issue at that point.

b) What orders to issue and who to bear the costs of the Application

28. The instant Application has not succeeded. But the Court has made an order by virtue of **Section 3A** of the **Civil Procedure Act** that to the effect that this suit be stayed in terms of **paragraph 22** above. I find that this is a matter that mainly pits siblings against each other. In terms of **Section 7** of the **Civil Procedure Act**, costs always follow the event unless for other reasons the judge directs otherwise. It would not be prudent to direct that one or the other of the parties bears the costs because he or she has lost in the issues before the Court. Thus, each party shall bear their own costs.

29. Thus, this suit is hereby transferred for final determination, to and shall be brought to the attention of the Judge in Bungoma High Court immediately upon the file being conveyed to the Registry of that Court. Thereafter it shall be mentioned before the Judge on **29/3/2022** when the 'sister' file shall be mentioned, for further directions.

It is so ordered

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 2ND DAY OF FEBRUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.