



**Kache v Lewa & 3 others (Environment & Land Case
E027 of 2021) [2022] KEELC 2336 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E027 OF 2021**

**MAO ODENY, J
JULY 12, 2022**

BETWEEN

**RUTH KABIBI KOMBE (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF KANZE LEWA KACHE) PLAINTIFF**

AND

**SAMSON CHARO LEWA 1ST RESPONDENT
PIJEY INVESTMENT LTD 2ND RESPONDENT
WHITE UNICORN LTD 3RD RESPONDENT
LAND REGISTRAR KILIFI 4TH RESPONDENT**

RULING

- 1 This Ruling is in respect of Notice of Motions dated 25th November 2020 and 18th January 2021 by the 3rd respondent/applicant and plaintiff/applicant respectively seeking the following orders;
1. Spent
 2. There be a stay of proceedings in this case pending the hearing and determination of this application.
 3. The honourable court be pleased to strike out the suit herein as the same is bad in law, it is scandalous, frivolous, vexatious and otherwise an abuse of the court process.
 4. Further and in the alternative and without prejudice to the foregoing, the suit be stayed pending the hearing and determination of ELC No. 195 of 2018 Ruth Kabibi Kombe vs White Unicorn Ltd & Kilifi Land Registrar.
 5. The honourable court be pleased to give directions for the hearing of this application.



6. The costs of this application be provided for.
- 2 The Plaintiff then filed an application dated January 18, 2022 seeking the following orders;
1. spent
 2. That an order does issue consolidating the instant suit with Malindi Environment and Land Case No. 195 of 2018.
 3. That the honourable court do make such other orders as it may deem fit, necessary and expedient in the interest of justice.
 4. The costs of the application be provided for.
- 3 Counsel agreed to canvas the application vide written submissions which were duly filed.

3rd Respondent's Submissions

- 4 Counsel relied on the sworn affidavit of Samson Charo Lewa a director of the 3rd defendant and submitted that application is res sub judice and does not disclose any claim or allegation against the respondent herein. Further that the suit does not disclose any reasonable cause of action or a justifiable claim against the defendants.

Mr Gambo submitted that there is a matter filed by the plaintiff vide a plaint dated 17th October 2018 being ELC No. 195 of 2018 Ruth Kabibi Kombe vs- White Unicorn Ltd & Kilifi Land Registrar seeking similar orders hence this matter is sub judice.

- 5 It was counsel's further submission that vide a Gazette Notice dated July 17, 2017, the National Land Commission found that although the deceased had made a claim to the land, she had nothing to support her claim as the land was originally allocated to Albert Samini who failed to appear for the hearing and the defendant's predecessors in title Rebecca Florence Kalume & 3 others regularly held the land whereby the embargo on the land was lifted.
- 6 Counsel relied on Section 6 of the *Civil Procedure Act* which provides that no court shall proceed with the trial of any suit or proceedings 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.
- 7 Counsel cited the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR* where it was held that a litigant has no right to pursue pari passu 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.
- 8 Mr Gambo stated that the Plaintiff/Respondent has filed the present suit approximately three years from the date she filed the previous matter herein which is ongoing hence both suits are pending before courts of competent jurisdiction and are between the same parties and or their representatives. Counsel urged the court to find that this suit is an abuse of court process and strike it out.
- 9 The plaintiff filed a replying affidavit dated 10th December 2021 and stated that the late Kanze Lewa Keche died while pursuing the title deed of the suit property and admitted that she filed ELC No 195 of 2018 which is still pending. It was her argument that this suit is against more defendants and that the previous suit is against the 3rd defendant and the land Registrar Kilifi. The respondent urged the court to consolidate the two matters as they involve the same subject matter and parties.



Analysis And Determination

- 10 The issues for determination are as to whether the suit is sub judice and an abuse of process and whether this suit should be consolidated with ELC No. 195 of 2018.

Section 6 of the **Section 6** of the [Civil Procedure Act](#) sets out the principle of *sub-judice* as follows: -

6. “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.”

- 11 This doctrine is to prevent parties from filing similar cases involving same parties and subject matters in courts with competent jurisdiction. Parties are not supposed to litigate by instalments and further that they should not be allowed to forum shop for courts. That is why the doctrine prevents courts from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. The rationale behind sub-judice rule is to prevent situations of having conflicting orders emanating from different courts over the same subject matter. This can cause embarrassment to the court.

In the case of *Kenya National Commission On Human Rights – Vs – Attorney General, I.E.B.C., & 16 Others [2020] Eklr*, the **Supreme Court of Kenya** stated as follows: -

...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...”

- 12 In is not disputed that there are two suits where the plaintiff has sued the defendants in respect of the same subject matter. The plaintiff has also admitted that she filed ELC No 195 of 2018 which involves the same subject matter, same parties apart from an additional defendant. The suit which was filed in 2018 is still pending and in order to circumvent this application the plaintiff filed an application for consolidation of these two suits.
- 13 It would be an abuse of court process to allow for consolidation of a suit which is sub judice, especially where an application invoking the doctrine of sub judice has been filed and is under consideration by the court.
- 14 In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Exparte Law Society of Kenya [2020] eKLR (supra)* where the court held that: -

... the issues at hand are crystal clear, namely, whether this suit offends the question of sub judice and whether it is an abuse of court process. If the answers are in the affirmative, then consolidation would be impermissible because its application was never meant to cure or cover the doctrine of sub judice or abuse of court process. Put differently, a plea for consolidation is not permissible in circumstances whereby it



is evident it is being used to evade the wrath of the sub judice rule as opposed to serving the settled principles of consolidation.”

15 Accordingly, 3rd defendant/applicant’s the application dated 25th November 2021 is hereby allowed as prayed and the plaintiff’s suit is struck out with costs. The plaintiff’s application dated 18th January 2022 for consolidation of the two suits is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

