



Taki & 35 others v Sururu & 7 others; Esho (Interested Party) (Environment & Land Case 23 of 2019) [2022] KEELC 12786 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 12786 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 23 OF 2019
CG MBOGO, J
OCTOBER 4, 2022**

BETWEEN

MOSES TAKI & 35 OTHERS PLAINTIFF

AND

SEMPEWUAN OLE SURURU & 7 OTHERS RESPONDENT

AND

ROKONKA OLE ESHO INTERESTED PARTY

RULING

1. What is before this court for determination is a Notice of Motion application dated June 10, 2022 filed by the applicants and expressed to be brought under section 3,3A and 6 of the *Civil Procedure Act* and order 51 of the *Civil Procedure Rules* seeking the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this application inter parties, there be temporary stay of proceedings in Narok Chief Magistrates Land Case No 46 of 2021 Rokonka Ole Esho v Naitoitoi Kie alias Matayian Ene Sururu.
 - c. That pending the hearing and determination of this suit there be temporary stay of proceedings in Narok Chief Magistrate Land Case No 46 of 2021 Rokonka Ole Esho v Naitoitoi Kie Alias Matayian Ene Sururu.
 - d. That costs of the application be provided for.
2. The application is premised on the grounds inter alia that the applicants filed the present suit on February 19, 2016 which is part heard and that on June 18, 2021 the interested party (sic) filed suit at



the Magistrates' court through ELC Case No 46 of 2021 seeking a declaratory order and a permanent injunction and whose subject matter is in the present suit.

3. The application is supported by the affidavit of Naitoitoi Ole Kie alias Matayian Ene Sururu sworn on even date. Naitoitoi Kie alias Matayian Ene Sururu deposed that she was a member of Enatario Olkiteng adjudication section and was displaced by a section of the committee from the land which she was in occupation. Further that sometime in June 2021, the interested party (sic) served her with a copy of the plaint and summons which was filed at the Magistrates' Court ELC Case No 46 of 2021 which is the cause of action in the suit currently before this court with a hearing set for June 22, 2022, and that it is only fair that this court stays the proceedings in the Magistrate's Court which is set for hearing on June 21, 2022.
4. The application is opposed by the replying affidavit of the interested party (sic) sworn on June 24, 2022. The interested party (sic) deposed that the adjudication process in Enatario adjudication section has long been completed and title deed issued to respective members and that the current suit before this court is not for determination on rightful ownership but on the adjudication section which process is long concluded. Further, that the orders that will emanate from this honourable court will not contradict the orders that will emanate from the Magistrates' Court as the orders sought are different and that the application is not brought in good faith but is intended to unfairly delay the determination of his matter in the Magistrates' Court.
5. Parties disposed off the application by way of written submissions.
6. The applicants submitted that the provisions under section 6 of the *Civil Procedure Act* state that any court cannot litigate on a matter pending in another court touching on the same subject matter and the same parties. The applicants submitted that the present suit is actively proceeding before this court and which upon hearing the suit on merit will delve into the issues surrounding the adjudication process, sub-division and allocation of the land forming part of Enatario Olkiteng adjudication section and as such contradicting orders may be issued which may occasion injustice towards the 20th plaintiff- Naitoitoi Ole Kie alias Matayian Ene Sururu. The applicants relied on the case of *Republic versus Paul Kihara Kariuki, Attorney General & 2 Others Ex-parte Law Society of Kenya* [2020] eKLR and *Mwangi Stephen Muriithi v Daniel Toroitich Arap Moi & another* [2017] eKLR.
7. The interested party (sic) filed written submissions dated July 25, 2022. The interested party raised one issue for determination which is whether the issues for determination and orders sought in the present case and in Chief Magistrates' ELC Case No 46 of 2021 are distinctively different. The interested party submitted that he is not a party in the present suit and therefore should not be bound by orders made in other independent cases or claims before any other court. The interested party further submitted that section 6 of the *Civil Procedure Act* is not applicable in the instant case. That for the same to apply, the matter in issue should be directly and substantially in issue in a previously instituted suit, the parties have to be the same or between parties under whom or any of them claim and litigating under the same title.
8. The interested party (sic) further submitted that the matter pending before the Chief Magistrates' Court is premised on a registered person claiming land from another person in unlawful occupation whereas the current suit is challenging an adjudication process that is long concluded and title deeds issued and therefore the outcome will not be to the effect that the interested party (sic) is not qualified to own land within the adjudication section. The interested party further submitted that the application is brought in bad faith as the proceedings sought to be stayed were filed in June, 2021 where Naitoitoi Ole Kie alias Matayian Ene Sururu has participated all through without raising any issue. The interested party relied on the case of *Kenya Wildlife Services v James Mutembei* [2019] eKLR.



9. I have analysed and considered the application, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the application has merit.
10. Section 6 of the *Civil Procedure Act* provides as follows:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

11. The Supreme Court in the advisory opinion in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others* (Interested Parties [2020] eKLR at para 67 stated;

“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 subjudice 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. I have perused the pleadings in ELC Case No 46 of 2021 filed at the Magistrates’ court and find that the interested party (sic) in this matter is a party to that suit. However, I find that the same is not sub judice for the reason that the interested party (sic) is not a party to the present suit.

13. On joining of interested parties, the Supreme court of Kenya in the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae)* [2017] eKLR quoted the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR to demonstrate elements applicable where a party seeks to be joined in proceedings as an interested party, they are:

“One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not



merely a replication of what the other parties will be making before the court.” (emphasis mine)

14. I do also note that the applicant herein has been actively participating in the lower court proceedings and it defeats logic why the application is brought a year later if not made in bad faith. Most importantly, it would be proper for the applicant to first and foremost move the court formally through an application to join the interested party (*sic*) before filing the instant application. The interested party (*sic*) is not a party in the present suit and therefore the application cannot be sustained.
15. Arising from the above, the notice of motion application dated June 10, 2022 is incompetent and it is hereby struck out with no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN court ON THIS 4TH DAY OF OCTOBER, 2022.

HON. MBOGO C.G.

JUDGE

4/10/2022

In the presence of:-

Mr T.Chuma/ CA

Ms Cheruto for the plaintiffs/applicants

Mr Kamwaro for the defendants/respondents

And in the absence of

Mr.Nyabwochwa for the interested party

