



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 66 OF 2020 (OS)

MARY NTHENYA WAMBUA & 5 OTHERS.....APPLICANTS

VERSUS

MULI NDETEL.....RESPONDENT

RULING

What is before Court for determination is the Respondent's Preliminary Objection dated the 26th January, 2021 in respect to the Originating Summons dated the 10th August, 2020 and application dated the 16th October, 2020, on the following grounds:

1. There exists another suit being MACHAKOS CMC ELC 93 of 2020 and the originating summons is sub judice and offends the provisions of Section 6 of the Civil Procedure Act.
2. The Defendant should have raised any Defence or Counter-claim in the existing suit not to file a fresh suit.
3. The Originating Summons is an abuse of the court process and prays for it to be struck out.

The Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection and the rivalling submissions, the only issue for determination is whether this suit should be struck out with costs, for being sub judice.

The Respondent/Applicant in his submissions insists this suit is sub judice. He contends that the trial court in Machakos CMC ELC No. 93 of 2018 has jurisdiction to grant the prayers sought therein. He avers that the Applicants herein should have filed a counterclaim in the lower court suit as opposed to filing a fresh suit. To support his arguments, he has relied on Section 38 of the Limitation of Actions Act; Section 13 and 26 of the Environment and Land Court Act; Section 9 of the Magistrates' Courts Act including the following decisions: **Edward Mwaniki Gaturu & Another V Hon. Attorney General & 3 Others (2013) eKLR; AHAD v CJE (2019) eKLR; Gulam Miriam Noordin V Julius Charo Karisa (2015) eKLR; Chevron (K) Ltd V Harrison Charo Wa Shutu (2016) eKLR and Patrick Ndegwa Munyua V Benjamin Kiiru Mwangi & Another (2020) eKLR.**

The Applicants/Respondents in their submissions insist this suit is not sub judice as the issues for determination are distinct. They insist the Magistrate's Court has no jurisdiction to order for adverse possession which claim cannot be raised in a counterclaim. To buttress their averments, they have relied on Order 37 Rule 7 of the Civil Procedure Rules; Section 38 of the Limitation of Actions Act; Section 13 of the Environment and Land Court Act including the following decisions: **Kibii Koskei V Kiplangat Arap Kimutai & 3 Others (2017) eKLR; Rose Wangui Wanderi (suing as the personal representative to the estate of Hezron Gatheru Kuria) V Samwel Mwangi Githamaro (2019) eKLR; Mtana Lewa V Kahindi Ngala Mwangandi (2015) eKLR and Richard Wefwafwa Songoi V Ben Munyifwa Songopi (2020) eKLR.**

On the issue of sub judice, I wish to make reference to Section 6 of the Civil Procedure Act which provides 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.'**

In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** the Court observed that: **'In order to check this very problem, 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. 20. In this regard, Section 6 of the Civil Procedure Act[6] expressly provides 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 mere addition of a party or parties does not alter the pith and substance of the suit. The Black's Law Dictionary[7] defines *lis pendens*, as a Latin expression which simply refers to a "pending suit or action." The Oxford Dictionary of Law[8] defines the expression in similar terms. In the context of Section 6 of the Civil Procedure Act[9] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed..... Paraphrasing what I said in the above case, the key words in applying sub judice rule is that "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.'

See also the case of **Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR**.

In this instance, the Respondent/Applicant contends that this suit is sub judice as the issues in dispute are pending in the **Machakos CMC ELC No. 93 of 2018** in which suit he sought to evict the Applicants having trespassed on the suit land. He insists the Applicants should have filed a Counterclaim on adverse possession instead of a fresh suit as the trial magistrate has jurisdiction to deal with this matter which fact the Applicants dispute. With this in mind, I wish to refer to Section 38 of the Limitation of Actions Act as well as Order 37 of the Civil Procedure Rules. From a reading of these legal provisions, it is clear that a claim for adverse possession is within the ambit of the Environment and Land Court Act. However, the Respondent/Applicant relied on the Magistrates' Courts Act and insists the Magistrates gazetted to handle ELC matters have jurisdiction to deal with adverse possession. From the definition of the doctrine of sub judice which I have quoted above, I note the matters in issue have to be similar. However, in this instance, insofar as the lower court case involved the same parties, the issues it is dealing with are distinct as they relate to trespass and eviction while this court is dealing with an issue of declaring ownership of suit land through adverse possession. The Respondent/Applicant has quoted the case of **Patrick Ndegwa Munyua V Benjamin Kiiru Mwangi & Another (2020) eKLR** arguing that the Magistrates Court can deal with issues of adverse possession which case I note is from the ELC and I opine that it is persuasive but not binding on this court.

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the decisions of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR; Mtana Lewa V Kahindi Ngala Mwangandi (2015) eKLR and Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR** I find that this suit is not sub judice and the Magistrates' Court did not have jurisdiction to deal with the issue of adverse possession which cannot be sought through a counterclaim. It is my considered view that the quoted decisions have not amended the provisions of Order 37 of the Civil Procedure Rules relating to procedure of instituting a suit in seeking a claim for adverse possession. I further find that this suit does not amount to an abuse of the court process. I opine that CMC ELC No. 93 of 2018 should be transferred to this court and consolidated with the instant suit.

In the circumstance, I find the instant Preliminary Objection unmerited and will proceed to disallow it, with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE