



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 92 OF 2019

1. TERESIA MUTEU NGUMBI (suing as an Administrator of the late

ISAACK MUMO MULEI)

2. JUMA HAMISI MWARASI (suing as an Administrator of the late

(HAMISI OMARI JUMA)

3. MWANAIDI MUSA NCHIKO (Suing as an Administrator of the late

ABDALLA MWAROPIA MOHAMED)

4. WILFRED MAWIOOO

5. JOSEPH MUKULA.....PLAINTIFFS

VERSUS

1. DIANI TOURISM HAND CRAFT

2. REGISTRAR OF TITLES KWALE.....DEFENDANTS

RULING

1. Before me for determination is the notice of preliminary objection dated 18th June, 2019 by the 1st defendant that the plaintiffs' suit offends the provisions of Section 6 of the Civil Procedure Act, that the cause of action as against the defendants herein lapsed as per the provisions of the Limitation of Actions Act and the Law of Reforms Act in respect of the 1st, 2nd and 3rd plaintiffs' claims and that the suit is an abuse of court process and should be struck out with costs.

2. The 1st defendant submitted that the dispute as set out in the plaint is that the plaintiffs were registered owners of PLOT NO. LUNGA LUNGA/MUKWENYI/112 since acquisition in 1989 and allege misrepresentation against the 1st defendant in depriving them of the property. The 1st defendant submitted that the dispute herein relates to the same property and the same facts as in **ELC No.71 of 2014, Mombasa, Joseph Ndunda Mukula, Wilfred Maviyoo & Isaac Mulel as office bearers Diani Tourism Handicraft Society –v- Josephat Mbithi** in which the deceased plaintiff No. 1, 4th and 5th plaintiffs filed suit in their alleged capacity as office bearers of the 1st defendant suing in regard to the suit property. That the dispute herein relates to the same property and the same facts, the deceased Hamisi Omari Juma & Abdalla Mwarepia Mohamed having been registered as trustees of the 1st defendant along with the other plaintiffs herein. The 1st defendant has provided the court with the relevant pleadings and submitted that the instant suit is sub judice and violates the provisions of Section 6 of the Civil Procedure Act. The 1st defendant's advocates relied on the findings in **ASL Credit Limited –v- Abdi Basid Sheikh Ali & Another (2019)eKLR** where the court faced with a claim of sub judice examined the pleadings provided in the related case and set out the holding in precedents on the rule and observed: "From the above cited cases, it is clear what the doctrine of sub-judice entails; same parties involved in same/similar subject-matter in various suits in different courts." The 1st defendant submits that the instant suit is a mere afterthought in consideration of the prayers sought in ELC No.71 of 2014. That the principles of sub-judice and res judicata operate in tandem to bring litigation to a close. The 1st defendant submits that the plaintiffs cannot be allowed to file multiple suits seeking diverse orders and cited Section 7, Cap 21 on res judicata "Explanation (4). Any matter which might and ought to have been made ground of defence or attack in such former suing shall be deemed to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." That the plaintiffs cannot cite the overriding objectives and Article 159 of the

Constitution in defence for the simple reason that the 4th and 5th plaintiffs in the matter and it is assumed the 1st plaintiff as a representative of the Estate were well aware of ELC NO.71 of 2014 that they filed and that the same is admitted in paragraph 11 of the plaintiff. The 1st defendant submitted that the instant suit should be struck out for being sub judice and parties await the courts judgment in ELC No. 71 of 2014. It is submitted that to allow a multiplicity of suits on the same subject matter will not only sanitize an abuse of court process but lead to conflicting judgment by the court on the same issue. Counsel for the 1st defendant relied on the finding of the Court of Appeal in **Kenya Commercial Bank Limited –v- Muiri Coffee Estate Limited & 3 Others (2013)eKLR** where it was stated:

“The learned judge with the concession of the Advocate for the 1st respondent that the suit in Milimani HCCC NO. 494 of 2008 and Milamani HCCC NO.122 of 2007 dealing with the same subject and between the same parties were still pending before court, should have stayed the suit and application in HCCC No.505 of 2008 which was filed during the pendency of the two other suits. From the foregoing, it is clear that this suit was res judicata, it was also sub judice. The preliminary objection was meritorious and ought to have been sustained.”

3. The 1st defendant further submitted that the cause of action in relation to the 1st, 2nd and 3rd plaintiff’s lapsed under Section 7 of Cap 22 as evident from the pleading in ELC NO.71 of 2014 that the suit property was allocated to the 1st defendant back in 2003, more than twelve years ago. That the same parties were trustees of the 1st defendant and the respective estate have not brought evidence of the respective Grant made to them or the personal interest in the suit property that accrued to the deceased persons. In conclusion the 1st defendant submits that the instant suit is for dismissal on the issue of sub judice and that the plaintiffs cannot be allowed to file a multiplicity of suits against the defendants for essentially the same orders.

4. The plaintiffs opposed the preliminary objection and submitted that upholding the objection at this stage would be draconian as there appeared to be substantive issues that ought to be heard and determined at the hearing. That the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party a day in court and that summary dismissal or striking out of a case is draconian issue that must be exercised with caution and as a last resort. The plaintiffs’ counsel cited the case of **Mukisa Biscuit Manufacturing Co. Limited –v- West End Distributors Ltd (1969)EA** and submitted that a valid preliminary objection has to have the following ingredients: a) it must be a pure point of law, b) it must be as able as a pure point of law to dispose of the suit; c) it must be raised on the basis that all facts pleaded by the other side are correct and settled d) it cannot be raised on matters of facts which the court will be called upon to ascertain or investigate, and e) it cannot be raised if the preliminary point seeks a relief which the court has discretion to grant or refuse. The plaintiffs submitted that the doctrine of res sub judice is applicable where two or more cases are filed between the same parties on the same subject matter. That both suits must be between the same parties or their representatives. According to the plaintiffs, ELC No.71 of 2014 and this case have different parties and therefore the doctrine of sub judice under Section 6 of the Civil procedure Act cannot apply.

5. The plaintiffs further submitted that the issues raised in this suit arose in the year 2011 hence the suit is not barred under the Limitation of Actions Act and the Law Reform Act. They relied on the case of **Justus Tureti Obara –v- Peter Koipetai Nengiso (2014)eKLR** and urged the court to dismiss the preliminary objection.

6. I have considered the submissions made. The preliminary objection by the 1st defendant is on the grounds that the plaintiffs’ suit is sub judice and time barred. In the case of **Mukisa Biscuits Manufacturing Co. Ltd (supra)**, it was held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.... 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.”

7. The first ground of objection raised by the 1st defendant is that the suit is sub judice. Section 6 of the Civil Procedure Act provides:

“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.”

8. In paragraph 11 of the Plaintiff, the plaintiffs have pleaded as follows:

“The plaintiffs avers (sic) that there is no other suit pending and they (sic) have been no previous proceedings in any court between the plaintiffs and the defendants over the same subject matter save for ELC NO.71 of 2014, Joseph Ndunda Mukula & 2 Others –v- Josephat Mbithi which touches on the suit property.”

9. In their defence, the 1st defendant has pleaded that the suit offends the provisions of Section 6 of the Civil Procedure Act. From their pleadings, the parties admit that there is a previously instituted suit or proceedings between the same parties (or some of them) which touch on the same subject matter as in this case. Whereas the 1st defendant has submitted that the instant suit should be struck out for being sub judice it is my finding, and I so hold, that even if a successful plea of sub judice has been proved, the appropriate remedy is not to strike out the suit as the 1st defendant has asked me to do. Instead, the viable order that would commend itself is for this suit to be stayed pending the determination of ELC NO.71 of 2014. Indeed the marginal notes used in Section 6 of the Civil Procedure Act are “stay of suit”. I therefore find that the objection on the ground that the suit is sub judice should not result in striking out the suit, but an order staying the same would suffice.

10. The other ground of objection raised by the 1st defendant is that the suit is time barred. The 1st defendant submitted that “the Cause of action in relation to the 1st, 2nd and 3rd plaintiffs lapsed under Section 7 of the Limitation of Actions Act as evident from the pleadings in ELC No. 71 of 2014 the suit property was allocated to the 1st defendant way back in 2003, more than twelve years ago.” From the decision referred to hereinabove, it is clear that a plea of limitation can rightly be raised by a preliminary objection. In order to determine whether or not the suit is time barred, one has to look at the pleadings. The subject of this litigation is the plaintiffs’ claim as contained in the plaint dated 17th May, 2019. In the plaint, the plaintiffs have pleaded that they acquired the SUIT LAND TITLE NO. LUNGA LUNGA/MAKWENYENI/112 measuring 8.65 hectares in the year 1989 as purchasers for valuable consideration without notice. They state that they were the first registered owners of the suit property after adjudication and that they never sold or transferred the same. The plaintiffs’ aver that they conducted a search at the Kwale Land Registry and were surprised to discover that the property had been transferred into the 1st defendant’s name through misrepresentation. Although the plaintiff have listed alleged particulars of misrepresentation by the 1st and 2nd defendants, it is not stated when the said search was conducted. The 1st defendant’s advocates in their submissions have referred the court to the pleadings in ELC No. 71 of 2014 and alleged that the suit property was allotted to the 1st defendant way back in the year 2003. It is based on this submission that the 1st defendant now wants the court to find that the suit is statute barred. These are matters that have not been pleaded by the 1st defendant in their defence. There is no agreement between the parties as to when the cause of action arose. In order for the court to decide on when the cause of action arose, there is need to make reference to evidence in the form of pleadings in ELC No.71 of 2014. Once a court relies on evidence to ascertain the claim in preliminary objection it is no longer a point of law and it fails. As already stated, a preliminary objection should raise a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained. Since the time when the cause of action arose is not agreed, and is a fact to be ascertained, I find that the objection in that regard cannot be sustained.

11. For the foregoing reasons, I find no merit in the preliminary objection on the ground that the suit is time barred. However, I do find that the suit is sub judice. The preliminary objection on the ground that the suit is sub judice is meritorious and is sustained. In the result, this suit is stayed pending determination of **Mombasa ELC No.71 of 2014, Joseph Ndunda Mukula & 2 Others –v- Josephat Mbithi**. Costs shall be in the cause.

12. It is so ordered.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 2nd day of June, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE