



Waiganjo & another (Suing as the administrators of the Estate of David Waiganjo Koinange (Deceased)) v NCBA Bank Limited & another (Commercial Case E472 of 2022) [2024] KEHC 914 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 914 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E472 OF 2022
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

**NANCY WAIRIMU WAIGANJO 1ST PLAINTIFF
YVONNE WANJIKU WAIGANJO 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF DAVID WAIGANJO
KOINANGE (DECEASED)**

AND

**NCBA BANK LIMITED 1ST DEFENDANT
LYDIA WAWERU T/A PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT**

RULING

1. This ruling relates to a Notice of Preliminary Objection filed in opposition to a Notice of Motion application dated 28th November, 2022. The application is filed pursuant to the provisions of Sections 1A, 1B, 3, 3A & 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya, and Order 40 Rules 1, 2, 3 (1) & (3), and 4 (1) of the Civil Procedure Rules, 2010. The plaintiffs/applicants seek the following orders –
 - i. Spent;
 - ii. Spent;
 - iii. That pending the hearing and determination of this suit this Honourable Court be pleased to grant the plaintiff a temporary injunction restraining the defendant whether by itself, its agents, servants, assigns, successors or otherwise howsoever from interfering, entering into,



occupying, offering for sale or whatsoever manner dealing with the Plaintiff's property known as LR. NO.MSA/MS/Block 1/337A;

- iv. That further and in the alternative, this Honourable Court be pleased to declare any purported sale by the defendants of the property known as LR. NO.MSA/MS/Block 1/337A, whether by public auction, private treaty or howsoever, null and void;
 - v. That such further or other orders as are appropriate for the effective administration of justice be issued; and
 - vi. That the costs of this application be met by the defendant.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn by Nancy Wairimu Waiganjo, the 1st plaintiff herein, who is also one of the Administrators of the estate of David Waiganjo Koinange (deceased). In opposition thereto, the 1st defendant/respondent filed a Notice of Preliminary Objection dated 21st February, 2023 raising the following grounds-
- i. That the application as filed and served is defective for want of jurisdiction contrary to the mandatory provisions of Section 13 of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya; and
 - ii. That the application and entire suit herein is res sub-judice in contravention of Section 6 of the [Civil Procedure Act](#) owing to the existence of Mombasa High Court Civil Suit No. E086 of 2022 - Ritah Nduku Muthusi v NIC Bank Limited, which suit emanates from the same facts, touches on the same subject matter and seeks the same orders as the instant suit.
3. This Court gave directions that the Notice of Preliminary Objection would be heard first and for written submissions to be filed. The 1st defendant's submissions were filed on 18th May, 2023 by the law firm of Wairimu Mureithi & Associates Advocates. The plaintiffs on the other hand neither filed written submissions nor made any oral submissions to the said Preliminary Objection.
4. Mrs. Omote, learned Counsel for the 1st defendant relied on the case of Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd [1969] EA 696 and stated that a Preliminary Objection is a point of law which may dispose of an entire suit at the preliminary stage. She cited the case of the Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. In regard to the issue of jurisdiction, she submitted that a Court must first ascertain its jurisdiction before embarking on the determination of any matter before it, and where the Court has no jurisdiction, it should down its tools. Counsel referred to the provisions of Section 13 of the [Civil Procedure Act](#) and submitted that the suit property in this case is situated in Mombasa hence this Court does not have the territorial jurisdiction to deal with issues surrounding it, as only the High Court sitting in Mombasa is seized of such jurisdiction.
5. She contended that this suit contravenes the express provisions of Section 6 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya owing to the existence of Mombasa HCCC No. E086 of 2022 - Ritah Nduku Muthusi v NIC Bank, which suit emanates from the same facts as the ones in this suit, touches on the same property and seeks similar orders to those sought by the plaintiffs in this suit. She pointed out that the suit filed in Mombasa was instituted by Ritah Nduku in her capacity as the widow of David Waiganjo Koinange (deceased). Counsel submitted that this Court lacks the requisite jurisdiction to hear and determine the instant suit. Mrs. Omote submitted that in as much as the parties herein are not similar to the parties in Mombasa HCCC No. E086 of 2022, it is noteworthy that both parties are litigating over the same subject hence the outcomes in the two Courts will automatically have an impact on the suit property.



Analysis and Determination.

6. Upon perusal of the 1st defendant's Notice of Preliminary Objection and the written submissions by its Counsel, the issues that arise for determination are-
 - i. Whether this Court has the requisite territorial jurisdiction to hear and determine this suit; and
 - ii. Whether the application and suit herein are res sub judice owing to the existence of Mombasa High Court Civil Suit No. E086 of 2022; Ritah Nduku Muthusi v NIC Bank Limited.
7. A Preliminary Objection ought to raise pure points of law and should be 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 an exercise of the Court's discretion. The Court in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra) set out what constitutes a Preliminary Objection in the following words –

“So far as I am aware, 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 point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the said case, Sir Charles Newbold P., stated that-

“..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.” (emphasis added).

Whether this Court has the requisite territorial jurisdiction to hear and determine this suit.

8. In the case of the Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd (supra), it was held as follows-

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
9. The 1st defendant submitted that the suit property in this case is situated in Mombasa, and the Court with the requisite jurisdiction to hear and determine the dispute between the parties herein is the High Court sitting in Mombasa. Upon perusal of the plaint and the application herein, it is evident that the subject matter of the suit property is LR. No. MSA/MS/Block 1/337A. This is because the plaintiff is seeking a permanent injunction restraining the defendants from disposing of and/or selling all that property known as LR. No. MSA/MS/Block1/337A, and a declaration that the entire process leading to the purported sale of the said property is ultra vires the law, null and void.



10. In light of the foregoing, it is evident that the suit property known as LR. No. MSA/MS/Block1/337A which is the subject matter in this case is situated in Mombasa. This Court was referred to the provisions of Section 13 of the Civil Procedure Act, Cap 21 Laws of Kenya which states as hereunder –

“Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.” (emphasis added).

11. In view of the above, I agree with the Counsel for the 1st defendant that this Court does not have the requisite territorial jurisdiction to hear and determine the dispute between the parties herein, since the suit property is situated in Mombasa and does not straddle both Mombasa and Nairobi so as to confer jurisdiction on the High Court sitting in Nairobi to hear the dispute between the parties herein. As such, the suit and the application herein ought to have been filed before the High Court sitting at Mombasa, which is where the suit property is situated. In the end, I find that the Preliminary Objection succeeds on this ground.

Whether the application and suit herein are res sub judice owing to the existence of Mombasa High Court Civil Suit No. E086 of 2022 - Ritah Nduku Muthusi v NIC Bank Limited.

12. The 1st defendant submitted that the suit herein offends the provisions of Section 6 of the Civil Procedure Act owing to the existence of Mombasa HCCC No. E086 of 2022 - Ritah Nduku Muthusi v NIC Bank, which suit emanates from the same facts as the ones in this suit, touches on the same property and seeks similar orders to those sought by the plaintiffs in this suit. Further, that the said suit was filed by Ritah Nduku in her capacity as the widow of David Waiganjo Koinange (deceased).

13. This Court is of the considered view that in order to determine whether or not this suit is res sub judice Mombasa HCCC No. E086 of 2022 - Ritah Nduku Muthusi v NIC Bank, the Court will have to ascertain facts and probe evidence. In the case of Edward R. Ouko vs. Speaker of the National Assembly & 4 others [2017] eKLR, when addressing the doctrine of res sub judice, the Court held as hereunder-

“ 18. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

- (1). There must exist two or more suits filed consecutively.
- (2). The matter in issue in the suits or proceedings must be directly and substantially the same.
- (3). The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.
- (4). The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

14. It is therefore this Court’s finding that the 1st defendant’s contention that this suit offends the doctrine of res sub judice does not suffice as a Preliminary Objection as it can not only be argued in the normal manner but it also involves probing of evidence in order to ascertain whether a plea of res sub judice can be properly raised by the 1st defendant. This therefore means that the Preliminary Objection fails on this ground.



15. As explained hereinabove, this Court does not have the requisite territorial jurisdiction to hear and determine this suit in view of the fact that the suit property which forms the subject matter of this suit is situated in Mombasa. The 1st defendant in its submissions urged this Court to transfer this suit to Mombasa High Court for it to be consolidated with Mombasa HCCC No. E086 of 2022 for determination in the event the Court is not inclined to uphold its Preliminary Objection.
16. In the circumstances, this Court transfers this suit to Mombasa High Court for hearing and determination. The 1st defendant is at liberty to make an application for consolidation of the two suits before the Judge in Mombasa who is seized of the hearing of Mombasa HCCC No. E086 of 2022 - Ritah Nduku Muthusi v NIC Bank. Since the Court has partly upheld the 1st defendant's Preliminary Objection, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiffs

Ms Muriithi for the 1st defendant

No appearance for the 2nd defendant

Ms B. Wokabi – Court Assistant.

