



REPUBLIC OF KENYA



**O'Brien v Omung'ala & another (Commercial Case E313 of 2022)
[2024] KEHC 2940 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E313 OF 2022
MN MWANGI, J
MARCH 1, 2024**

BETWEEN

WANDA GAY TWYNEHAM O'BRIEN PLAINTIFF

AND

IRENE W. OMUNG'ALA 1ST DEFENDANT

**MAGDALENE WAIGANJO T/A NYOKABI WAIGANJO, OMUNG'ALA &
ASSOCIATES 2ND DEFENDANT**

RULING

1. The plaintiff instituted this suit by way of an Originating Summons (OS), dated 10th August, 2022, brought under Order 52 Rule 4 of the *Civil Procedure Rules, 2010*. The plaintiff's case is that the defendants represented her and her late husband, Joseph Thomas O'brien in the sale of their property known as LR No 3734/245- O'washika Road, Lavington, Nairobi. That the defendants received the entire purchase price Kshs 150,000,000/- and remitted Kshs 130,000,000/- to the plaintiff and her late husband. The defendants were to deduct legal fees of Kshs 1,500,000/- from the balance of the purchase price and remit Kshs 18,500,000/- to them but have defaulted. The plaintiff seeks payment of Kshs 18,500,000/- with interest at 14% per annum from the date it was due on 1st July, 2019, until payment in full.
2. The defendants filed a Notice of Preliminary Objection (PO) dated 14th December, 2022, on the following ground-
 - i. That in light of the provision of Section 6 of the *Civil Procedure Act*, this Court cannot proceed to hear and determine this matter, as the same matter involves the same parties and same subject matter which is still freshly active and pending hearing at the Law Society Tribunal.



3. The PO was canvassed through written submissions. The defendants' submissions are dated 30th January, 2023. The defendants' Counsel submitted that the defendants have established that the instant suit is res sub judice because before instituting this suit, the plaintiff had filed a complaint before the Advocates Disciplinary Tribunal (Tribunal) through an affidavit sworn by Joseph Thomas O'Brien on 15th October, 2020 and the case was allocated complaint No DTC/17/2021. The defendants asserted that the subject matter in this suit and in the Tribunal are the same and involve the same parties. That the matter pending before the Tribunal was scheduled for hearing on 6th February, 2023 and that the Tribunal's jurisdiction has not been challenged. The defendants urged this Court to allow their PO with costs and to stay the suit pending the hearing and determination of the complaint before the Tribunal. The defendants relied on Section 6 of the Civil Procedure Act and the case of ANN v RMK (Civil Appeal No E042 of 2021) [2021] eKLR.
4. Through written submissions dated 7th February, 2023, the plaintiff contended that the instant matter is not sub judice. She however conceded that the parties and the subject matter before this Court and the Tribunal are similar, but contended that the issues for determination are different. The plaintiff asserted that the Tribunal's mandate is limited to determining whether the defendants are culpable of professional misconduct in failing to account and remit the plaintiff's proceeds of sale of her property to her. The plaintiff argued that the Tribunal lacks jurisdiction to determine this matter citing Section 60(4)(e) of the Advocates Act which states that the Tribunal can only make an order for compensation not exceeding Kenya Shillings Five Million (Kshs 5,000,000/=).
5. The plaintiff relied on the case of Republic v Disciplinary Committee & 2 others ex parte Daniel Gichuru Nyingi [2014] eKLR, to support her submissions. The plaintiff pointed out that Section 60(9) of the Advocates Act contemplates that a matter can be before the Tribunal and still be pursued in Court as a civil suit.
6. The plaintiff relied on the Supreme Court decision in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) for the proposition that the doctrine of sub judice would apply only if the whole of the subject-matter in both the proceedings is identical.

Analysis and Determination.

7. I have considered the Originating Summons, the Preliminary Objection, and the parties' respective submissions. The issue that falls for determination is whether the defendants have established the elements required to show that the instant matter is res sub judice.
8. In regard to what constitutes a Preliminary Objection, the Court in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 stated as follows-

"So far as I'm 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.

In the same case, Sir Charles Newbold stated thus:

"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 had 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 the issue. The improper practice should stop.”

9. The doctrine of sub judice is provided for under Section 6 of the [Civil Procedure Act](#) as follows-

“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.....”
10. In [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR), the Supreme Court addressed the doctrine of sub judice in detail, in the following words-

“(67) 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 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.”
11. It is evident from the above decision that the elements required to establish sub judice are that there has to be more than one suit over the same subject matter, that one suit was instituted before the other; that the suits are pending before Courts of competent jurisdiction and that the suits are between the same parties or their representatives.
12. The plaintiff conceded that there is a matter pending between the same parties over the same subject matter before the Advocates Disciplinary Tribunal. This is also manifest from the record herein. The plaintiff exhibited a copy of a letter dated 12th February, 2020 lodged by the complainant, who was her late husband.
13. The plaintiff argued that this matter is not sub judice and that it was properly instituted before this Court as the issues for determination are distinct. That the complaint before the Tribunal is in respect to the discipline of the defendants as Advocates, whereas the instant suit is in respect of the claim against the defendants for the refund of Kshs 18,500,000/- being the balance of the purchase price of Kshs 20,000,000/-, less legal fees of Kshs 1,500,00. It is however my finding that the issues raised in both matters are the same, as the complaint before the Tribunal is not purely disciplinary. The said complaint requires determination of whether the defendants wrongly withheld the plaintiff’s funds and whether the Tribunal should grant an order for reimbursement or refund.



14. As to the question of the jurisdiction of the Tribunal, the defendants argued that the Tribunal's jurisdiction has not been challenged. The plaintiff however argued that the Tribunal does not have the jurisdiction to order compensation or reimbursement exceeding an amount of Kshs 5,000,000/-.
15. On one hand, Section 60(4) of the *Advocates Act* provides the following-
- “After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—
- (a) that such advocate be admonished; or
 - (b) that such advocate be suspended from practice for a specified period not exceeding five years; or
 - (c) that the name of such advocate be struck off the Roll; or
 - (d) that such advocate do pay a fine not exceeding one million shillings; or
 - (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, or such combination of the above orders as the Tribunal thinks fit.”
16. On the other hand, Section 60 (9) of the *Advocates Act* provides as follows-
- “In any case where the complainant has not filed a civil suit against the advocate in respect of the sum in dispute, the Tribunal may order the advocate to pay to the complainant such sum as it finds to be due from the advocate.” (emphasis added).
17. It is clear from the provisions of Section 60(9) of the *Advocates Act* that the Tribunal has the jurisdiction to order the Advocates herein to pay the complainant therein (plaintiff herein), such an amount or amounts of money it may find due and owing, without the need for the complainant therein to file a separate civil suit before a Court.
18. I do not agree with the plaintiff's contention that the said provisions allow parties to pursue a matter through a complaint before the Tribunal and through a civil suit in Court simultaneously. If both matters are concurrently pursued and the Tribunal decides to order the plaintiff to be paid the amount claimed under Section 60(9) of the *Advocates Act*, the issues pending before this Court would be rendered res judicata. That would also go against the rationale behind the doctrine of sub judice which prevents a multiplicity of suits between parties as the same would lead to abuse of the Court process, wastage of precious resources in terms of time and money, and unnecessarily create case backlog. See *Republic v Paul Kibara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR.
19. It is my finding that the Tribunal has the jurisdiction to hear the dispute before it and render a considered determination on the same. Consequently, I find that the Originating Summons is sub judice.
20. The upshot is that the Preliminary Objection is merited. It is allowed with costs to the defendants. The Originating Summons is hereby struck out with no orders as to costs.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

**In the presence of:

No appearance for the plaintiff

Mr. Ochieng for the defendants

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J

