



**In re Estate of Isaiah Begi Gesicho (Deceased) (Civil Suit  
15 of 2016) [2023] KEHC 19936 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19936 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 15 OF 2016  
JRA WANANDA, J  
JULY 14, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE ISALIAH BEGI GESICHO**

**BETWEEN**

**JUMA GETANDA GESICHO ..... 1<sup>ST</sup> PLAINTIFF  
EVANCE KAMBUNI GESICHO ..... 2<sup>ND</sup> PLAINTIFF  
DAVID OGEKA GESICHO ..... 3<sup>RD</sup> PLAINTIFF  
MARY MORAA GESICHO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**ROBERT OUKO GESICHO ..... DEFENDANT**

**RULING**

1. Before the Court for determination is a Preliminary Objection seeking stay of this suit on the ground that it is directly and substantially in issue in another suit.
2. The Plaintiffs and the Defendant are all siblings and sons to the late Isaiah Begi Gesicho (deceased), whose estate is the subject of this suit.
3. This suit was commenced by the Plaintiffs vide the Originating Summons dated 5/12/2016 and filed in Court on 7/12/2016 through Messrs Ngigi Mbugua & Co. Advocates. The Plaintiffs pleaded that being heirs and sons of the late Isaiah Begi Gesicho who died intestate and left the following undivided shares; 2 acres from LR No. Langas Farm Eldoret Municipality in Uasin Gishu County, 15 acres from LR No. Tulwet Farm Kitale in Trans Nzoia County and  $\frac{3}{4}$  acre from LR No. 1223 Kapsabet Town in Nandi County. The Plaintiffs prayed for orders that the Defendant furnish an explanation or account on how he has dealt with the said 3 parcels of land, status, income and liabilities, the Defendant undertakes to release to the Plaintiffs their respective shares in the above properties, the Defendant deposits in Court deeds or instruments of ownership of the parcels of land pending ascertainment



of the shares due to the parties, pending the above exercise, and that the Defendants be restrained or curtailed from continuing to deal with the above parcels of land to the detriment of the Applicants and the estate

4. In his Affidavit filed in support of the Originating Summons, the 1<sup>st</sup> Plaintiff deponed that the Plaintiffs' mother, the late Priscilla Nyaboke Gesicho was appointed administrator of the estate of the Plaintiffs' late father vide Grant of Probate made in Nairobi High Court Succession Cause No. 493 of 1985, together with the other Plaintiffs and the Defendant they have petitioned and been substituted as administrators of the estate through Grant made on 22/09/2014, ever since the demise of their mother on 30/08/2008, the Defendant has assumed and behaved as if he was the sole heir to the estate and has not consulted with the Plaintiffs, the Plaintiffs did obtain orders of preservation of the estate from the Succession Court but the Defendant has continued to register himself, subdivide and sell the properties as if he were the sole heir, unless the shares for each beneficiary are determined the Defendant shall squander the entire estate for himself, he has come across agreements entered into by the Defendant during the pendency of the Succession Cause that suggest that the Defendant treats the estate as his own, the Plaintiffs are prejudiced by the activities of the Defendant and unless the same is urgently resolved, the Plaintiffs will be disinherited.
5. The Defendant opposed the Originating Summons by filing a Replying Affidavit in which he raised various matters. The same was filed on 11/04/2017 through the firm of Messrs Kefa Ombati & Co Advocates. Together with the Replying Affidavit, the Defendants also filed the present Preliminary Objection dated 6/04/2017 and filed on 11/04/2017. The same is based on the following ground:

“That the matter in issue in this suit are also directly and or substantially in issue in Nairobi HCSC No. 493 of 1985 - In the matter of the estate of Isaiah Begi (Deceased)”
6. The Plaintiffs then filed a Further Affidavit filed on 10/10/2017 and the Defendant, too, filed a Supplementary Affidavit on 4/08/2022. It was then directed that the Preliminary Objection be canvassed by way of written submissions.

### **Defendant's Submissions**

7. In support of the Preliminary Objection, the Defendant's Counsel filed his Submissions on 4/08/2022. He submitted that these proceedings relate to the estate of the parties' father who died on 15/03/2015, the Plaintiffs and the Defendants are beneficiaries of the estate, the parties' mother Priscilla Nyaboke Gesicho (also deceased) petitioned for a Grant of Letters of Administration intestate of the deceased's estate vide Nairobi HSCC No. 493 of 1985, the properties the subject matter of this suit form part of the estate of the deceased, a Grant of Letters of Administration was issued on 29/11/1985, the same was subsequently confirmed on 7/04/1985, according to the Certificate of Confirmation the capital assets of the estate were to be shared between the Defendant and the Plaintiffs as joint proprietors, their mother Priscilla Nyaboke Gesicho died on 30/08/2008, on 8/06/2009 the Plaintiffs filed an Application in Nairobi HCSC No. 493 of 1985 seeking orders for an injunction to restrain the Defendant from alienating, selling, disposing or dealing with the estate, an order compelling the Defendant to render accounts on all rent collected from the estate parcels of land, an order for substitution of the Administrator(s) of the estate to the Defendant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs, on 9/06/2009 the Court in Nairobi HCSC No. 493 of 1985 gave an order restraining the Defendant from alienating, disposing of or dealing with the estate, on 16/07/2012 the Court in Nairobi HCSC No. 493 of 1985 gave an order that a Valuation Report of all assets of the estate be prepared and filed in Court within 90 days, on 22/09/2014 the Court in Nairobi HCSC No. 493 of 1985 gave orders that the parties herein be appointed Administrators of the estate in substitution



of their late mother, the deceased's 3 daughters be included as beneficiaries of the estate and that the Administrators distribute the estate within 45 days.

8. Counsel submitted further that in the Originating Summons herein the Plaintiffs seek an order that the Defendant furnishes an explanation or account as to how he has dealt with the 3 parcels of land, the status, income and liabilities, in a Summons filed on 8/06/2009 by the Plaintiffs in HCSC No. 493 of 1985, the Plaintiffs seek an order compelling the Defendant to render an account in respect of all the rent collected from the estate of the deceased including the 3 parcels of land the subject of the Originating Summons, in the Originating Summons the Plaintiffs seek a determination of their shares and an order for the release of their shares in the 3 properties, the Plaintiffs' share in the deceased property has already been determined in Nairobi HCSC No. 493 of 1985, the Court directed that a Valuation Report of all the assets of the estate be filed in Court within 90 days and the Administrators distribute the estate within 45 days, the Plaintiffs seek an order restraining the Defendant from continuing to deal with the 3 parcels of land, in the Application filed on 8/06/2009 by the Plaintiffs in Nairobi HCSC No. 493 of 1985 they sought an injunction to restraint the Defendant from alienating, selling, disposing of or dealing with the estate, on 9/06/2009 the Court in Nairobi HCSC No. 493 of 1985 gave an order restraining the Defendant from alienating selling, disposing of or dealing with the estate.
9. In conclusion, Counsel submitted that in a nutshell, the matters in issue on this suit are also directly in issue in Nairobi HCSC No. 493 of 1985. He cited the case of *Re Estate Julius Ndubi Javan (Deceased) (2018) eKLR* and stated that the probate Court being the High Court in Nairobi HCSC No. 493 of 1985 has not made any decision to pack or appropriate and set aside the 3 properties the subject of the Originating Summons herein.

#### **Plaintiffs' Submissions**

10. In opposition to the Preliminary Objection, the Plaintiffs' Counsel submitted that jurisdiction of the Courts is donated by *the Constitution*, statute, custom or common law practice, Section 47 of the *Law of Succession Act* gives the High Court jurisdiction to deal with any matter arising under the Act, Probate and Administration Court under Rule 73 of the Probate and Administration Rules gives the Court the power to issue orders it deems fit in the interest of justice, the High Court in this regard has concurrent jurisdiction to determine disputes of Succession relating to land, Order 37 Rule 1 of the Civil Procedure Rules stipulates that an Application under it is by Originating Summons, Order 37 also identifies categories of people who and the matters in respect to which the Originating Summons may be taken out, it mentions a number of categories of people entitled to take out Originating Summons and must be read together with Rule 41(4) of the Probate and Administration Rules which restricts the persons who can take out such Originating Summons to personal representatives, while Order 37 Rule 1 specifies the number of questions which may be raised in the Originating Summons for purposes of succession proceedings, Rule 41 (3) thereof restricts the questions to be raised to the issues mentioned in that sub-rule, namely, share of the estate or condition or clarification attaching to such share of the estate, those questions are determined under Order 37 Rule 1 of the Civil Procedure Rules "without the administration of the estate".
11. Counsel added that the position is as outlined above because in proceedings under the *Law of Succession Act*, provisions of the *Civil Procedure Act* and Civil Procedure Rules do not apply except those specifically mentioned in Rules 41 and 63(1) and those applicable by virtue of Rules 49 and 73 of the Probate and Administration Rules, the Plaintiffs are properly before this Court as the questions they have brought are questions which cannot be conveniently determined by the Probate Court in Nairobi HCSC No. 493 of 1985 during the hearing of and application for confirmation of grant in



that Court. He cited Section 82 of the Law of Succession Act on powers of personal representatives and added that furthermore, proceedings in Nairobi HCSC No. 493 of 1985 having been conducted under the provisions of Section 71 of the Laws of Succession Act and the said proceedings having been determined and concluded, the Plaintiffs are properly before this Court. He cited the case of Re Estate of Alice Mumbua Mulwa (Deceased) 2017 eKLR and added that in the instant suit, the Defendant has subdivided the suit lands unilaterally and sold to third parties and that is why the Plaintiffs are seeking for the orders herein.

12. Counsel submitted further that whereas the Application filed on 8/06/2009 in Nairobi HCSC No. 493 of 1985 sought an order compelling the Defendant to render an account in respect of all rent collected from the estate of the deceased, the instant Originating Summons asks the Defendant to account for 3 specific properties in which he has subdivided and sold to third parties, whereas the Court in Nairobi HCSC No. 493 of 1985 directed that a valuation report of the assets of the deceased be prepared and filed in Court in 90 days and the administrators who include the Plaintiffs, distribute the estate as per the certificate of confirmation of grant, nothing had been done to implement the order due to frustrations from the Defendant thus necessitating the filing of the instant Originating Summons, whereas on 9/06/2009 the Court in Nairobi HCSC No. 493 of 1985 gave an order restraining the Defendant from interfering with the deceased's estate, the instant Originating Summons has its tentacles in the specific suits lands forming the basis of this suit in which the Defendant has without any colour of right sub-divided and is suspected of disposing off. He cited the case of Thiba Mining Hydro Co. Limited vs Joseph Karo Ndigire (2013) eKLR and submitted that it is not the form in which the suit is formed that determined whether it is sub-judice or not but the substance of the suit and looking at the pleadings in both cases, as such by reading of the two pleadings one can clearly see that the matter in issue in the instant suit cannot be said to be substantially in issue in Nairobi HCSC No. 493 of 1985.

### **Analysis & Determination**

13. What constitutes a preliminary objection was set out in the case of Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors (1969) EA 696 where their Lordships observed as follows:

“---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 the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

14. Neither of the parties has addressed the Court on whether or not the present Preliminary Objection meets the threshold set out above or at least, no challenge was raised thereon. In the circumstances, I will proceed to determine the substantive issues.



15. In my view, the issue that arises for determination in this matter is as follows:

“whether the matter in issue in this suit are also directly in issue in Nairobi HCSC No. 493 of 1985 – In the matter of the estate of Isaiah Begi (Deceased).
16. Although neither of the parties has expressly mentioned it, it is clear that the present Preliminary Objection is based on the principle of sub judice which is set out in the Civil Procedure Act at Section 6 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.”
17. The Defendant’s contention is that the matters in issue in Nairobi HCSC No. 493 of 1985 are also directly and/or substantially the same in issue in the present suit. The Defendant has exhibited copies of relevant pleadings filed in Nairobi HCSC No. 493 of 1985 and also some Orders issued therein.
18. A perusal of the Originating Summons filed herein reveals that the subject matter in this suit is a dispute by siblings over the inheritance of the estate of their late father, Isaiah Begi Gesicho who died in the year 1985. The suit is brought as an offshoot of the existing and earlier filed substantive Succession Cause filed as Nairobi High Court Succession Cause No. 493 of 1985. Initially, the parties’ mother, Priscilla Nyaboke Gesicho was the sole Administrator. The Certificate of Confirmation of Grant reveals that 11 land parcels were identified and distributed in terms that the 1<sup>st</sup> - 3<sup>rd</sup> Plaintiffs and the Defendant were all named as joint proprietors for all the 11 properties. The mother however died in year 2008 leaving the estate without an Administrator.
19. It is also apparent that on 8/06/2009, the 1<sup>st</sup> - 3<sup>rd</sup> Plaintiffs filed an Application in the substantive Succession Cause seeking orders that the Defendant herein be restrained by injunction from alienating, selling, disposing of and/or dealing with the properties of the estate. Pending hearing and determination of the Application, the Plaintiffs also sought interim orders compelling the Defendant to render a true account in respect of rent collected and income received from leasing or farming activities in some of the properties and proceeds for the sale of a motor vehicle and also life insurance proceeds of the deceased, an order compelling the Defendant to open an account jointly with the 1<sup>st</sup> – 3<sup>rd</sup> Plaintiffs to preserve rental incomes and an order substituting their mother with the 1<sup>st</sup> - 3<sup>rd</sup> Plaintiffs and Defendant as Administrators.
20. Upon hearing the Application ex parte in the first instance, and having certified the same as urgent, on 9/10/2009 the Court issued interim orders restraining the Defendant, by injunction, from alienating, selling, disposing of and/or dealing with the properties of the estate.
21. No pleadings or orders to demonstrate what subsequently transpired after the inter partes hearing of the Application has been exhibited but from the parties’ respective Affidavits, I can deduce that the Court later ordered that a Valuation Report of all assets of the estate be filed in Court, ordered substitution and appointment of the 1<sup>st</sup> - 3<sup>rd</sup> Plaintiffs and the Defendant as joint co-Administrators, ordered that the parties’ 3 sisters be included as beneficiaries, and also ordered the Administrators to distribute the estate within 45 days.
22. I have also come across respective Affidavits filed by the parties in the substantive Succession Cause between November 2015 and February 2016 whereof they presented their respective proposed modes



of distribution. It is not however disclosed whether these proposals have been canvassed and/or determined.

23. Now, in this instant Originating Summons, the prayers sought by the Plaintiffs are that the Defendant be ordered to furnish an explanation as to how he dealt with 3 particular parcels of land comprised in the estate, including but not limited to their current status, income and liabilities, that the Defendant immediately undertakes to release to the Plaintiffs their respective shares of the said parcels of land, that the Defendant deposits into Court, deeds or instruments of ownership of the said parcels pending ascertainment of the shares due to the parties, pending the above exercise, the Defendant be restrained from continuing to deal with the parcels of land to the detriment of the Defendants.
24. In light of the foregoing, the question that arises is whether on the basis of the above scenario, it can be said that the matters in issue in the two matters are the same?
25. I understand the Plaintiff's Counsel to be accepting that indeed both matters relate to administration of the estate of the deceased, including inheritance by his children. However, Counsel argues that Order 37 Rule 1 of the Civil Procedure Rules under which the Originating Summons has been premised, must be read together with Rule 41(4) of the Probate and Administration Rules. According to Counsel, while Order 37 Rule 1 of the Civil Procedure Rules mentions a number of categories of people entitled to take out Originating Summons and restricts the persons who can take out such Originating Summons to personal representatives and also specifies the number of questions which may be raised in the Originating Summons for purposes of succession proceedings, Rule 41 (3) of the Probate and Administration Rules on the other hand, restricts the questions to be raised to the issues mentioned in that sub-rule, namely, share of the estate or condition or clarification attaching to such share of the estate, those questions are determined under Order 37 Rule 1 of the Civil Procedure Rules "without the administration of the estate.
26. The Plaintiff's Counsel then argues that this matter is properly before this Court as the questions they have brought are questions which cannot be conveniently determined by the Probate Court in Nairobi HCSC No. 493 of 1985 during the hearing of and application for confirmation of grant in that Court.
27. My understanding of the reference to Order 37 Rule 1 of the Civil Procedure Rules in Rule 41 (3) of the Probate and Administration Rules is that it is invoked in relation to and applies to claims made by 3<sup>rd</sup> parties against the estate. I do not believe that Order 37 Rule 1 was meant to be invoked in determination of claims between or amongst heirs within the family of a deceased. Claims between or amongst heirs within the family of a deceased person are dealt with strictly within a Succession Cause and is basically the whole essence behind the existence of the *Law of Succession Act*.
28. On this point, I refer to the case of In Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR where a third party claimed entitlement to a parcel of land owned by the deceased alleging that he had purchased the parcel of land from the deceased before the latter's death. In dismissing the third party's Application to joinder and leave to file a protest in the Succession Cause but allowing his Application for revocation of the Grant, Hon. Justice F Gikonyo observed as follows:
  - (15) Whereas I agree with the advocates for the Petitioners that the Applicant's claim should be dealt with under Order 37 of the Civil Procedure Rules (previously Order XXXVI, rule 1 of the Civil Procedure Rules), but the decision to pack or appropriate and set aside the property or portion thereof in dispute for determination under order 37 of the Civil Procedure Rules is made by the Probate Court under rule 41(3) of the Probate and Administration Rules. For emphasis I reproduce the said sub-rule below:-  
.....



“[16] For better appreciation of the effect of the determination of ownership under Order 37 of the Civil Procedure Rules on a succession cause and the relationship between the two proceedings, see Musyoka J in re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR that:

“...If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

29. In the said Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR, Musyoka J stated as follows:

“23. .... Succession causes are not ordinary suits in the sense where there are two rival claimants, asserting certain rights. Rather, it is a cause designed for the sole purpose of facilitating succession to the estate of a dead person. The ultimate goal being distribution of the estate amongst the persons, if they are more than. There are no parties as such in the succession cause akin to plaintiffs and defendants, or petitioners and respondents.

.....

25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.

26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.

27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.

28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.



29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place.”
30. From the foregoing, it is clear that it is the role of the Succession Court to identify the heirs or survivors within the family who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst them. I therefore do not agree with the Plaintiff’s Counsel that a person within the family of the deceased and whose claim to inherit as an heir is not contested can justifiably invoke Order 37 Rule 1 of the Civil Procedure Rules for determination of his share in the estate as against other persons within the same family and whose claims to inherit as heirs is equally not contested. In other words, I do not believe that Order 37 Rule 1 was meant to be a forum or avenue for determination of disputes over the estate of a deceased person between or amongst his heirs within his family. Order 37 Rule 1 can only have been meant to serve the purpose of determining simple and straight-forward claims made against the estate by third parties or creditor to the estate.
31. The Plaintiff’s Counsel submits that the proceedings in Nairobi HCSC No. 493 of 1985 having been conducted under the provisions of Section 71 of the Laws of Succession Act and that the said proceedings having been determined and concluded, the Plaintiffs are properly before this Court. Again, this reasoning per se cannot be justification for instituting fresh proceedings under Order 37 Rule 1 of the Civil Procedure Rules. This is because the Succession Court in Nairobi HCSC No. 493 of 1985 has already identified all the parties herein as beneficiaries and has also substantially given directions on distribution of the assets. What the Plaintiffs, in effect, are seeking in this present suit is implementation or giving of effect to the Succession Court’s Orders on distribution of the assets amongst the beneficiaries. I do not know of any provision of law that bars a person declared a beneficiary by a Succession Court from returning to the same Court post-confirmation of Grant to seek implementation or giving of effect to such Court orders. Indeed, the Court would in such circumstances be entitled to invoke its powers under the contempt of Court mechanism and punish any person disobeying or frustrating its orders.
32. In any event, I have already set out the Applications that the Plaintiffs have made before the Succession Court in Nairobi HCSC No. 493 of 1985 post-confirmation of the Grant and the orders made thereon. The orders include, inter alia, an injunction against the Defendant from alienating or disposing the estate properties, appointment of all the parties herein as co-Administrators and filing of valuation Report for all the assets. Further, both parties have already filed their respective modes of distribution before the Succession Court. This is despite the fact that none of the parties has addressed me on the status, fate or progress of the Court’s determination on these modes of distribution presented. In my view, the mere filing of these Applications before the Succession Court post-confirmation of the Grant and the Court granting allowing the Applications is sufficient proof that both the Plaintiffs and the Court appreciated that the Succession Court still retained jurisdiction even post-confirmation of the Grant to give effect to or enforce its earlier orders.
33. Further, it is evident that some of the orders being sought in the Originating Summons, such as the order that the Defendant be restrained from continuing to deal with the estate parcels of land (prayer No. 4), have already been granted by the Succession Court in terms of the injunction already referred to above. Similarly, the prayer that the Defendant immediately undertakes to release to the Plaintiffs their respective shares (prayer No. 2) has been catered by the order of the Succession Court that the Administrators distribute the estate within 45 days. The prayer will also be taken care of by the orders



that will arise once the issue of the respective modes of distribution presented to the Succession Court by the respective parties is determined by that Court. Further, an Administrator can at anytime be called upon by the Succession Court to furnish an Account of how he has administered the estate and/or deposit into Court any deeds or instruments of ownership of the assets of the estate. Again, this mandate of the Succession Court renders unnecessary the bringing of prayer No. 1 and 3 in these fresh proceedings.

34. My finding is therefore that all the prayers made in the present Originating Summons can all be appropriately canvassed and determined in the already existing Succession Cause, namely, Nairobi HCSC No. 493 of 1985 post-confirmation of Grant without the necessity of filing these fresh proceedings under Order 37 Rule 1 of the Civil Procedure Rules.
35. I believe that I have said enough to indicate that I find that the matters in issue in this present suit and commenced under Order 37 Rule 1 of the Civil Procedure Rules are also directly in issue in the already existing Nairobi High Court Succession Cause No. 493 of 1985 – In the matter of the estate of Isaiah Begi (Deceased).
36. I wholly associate myself with the following sentiments of Hon. Justice J. Mativo (as he then was) in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR

“16. I now turn to the question of sub judice which Mr. Ochiel avoided to address. A useful starting point is section 5 of the *Civil Procedure Act*<sup>[4]</sup> which provides that any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. The operative words in this provision are “expressly” or “impliedly barred.”

17. With a large number of pending cases, the judiciary is overburdened and faces a stark lack of resources. In a situation like this, when two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources and frivolous litigation. In order to correct this redundancy, there exists the doctrine of sub judice which is captured in section 6 of the *Civil Procedure Act*. [5] In a humble attempt to understand the principle and reasoning behind this doctrine and its application, I will attempt to analyse some salient features of the rule of sub judice.

18. Both suits challenge the same decision. The prayers sought in both suits are the same. Since both the suits cite similar issues, the decision of the first suit should be binding on those issues and it need not be tried again. If the plea in the first suit succeeds, then it will render the second case *res judicata*. In fact, a favourable decision would not only benefit the Nairobi Branch, but the entire bar in the country. This truth renders the second suit useless and of no utilitarian value. A second trial on the same issues would entail duplication of work as evidence required to prove those issues in the first suit would be similar to those in the second suit (read instant suit). Thus, it is desirable that such issues be resolved or adjudicated by one court only. It will avoid conflicting decisions or complications arising therefrom.

19. 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*<sup>[6]</sup> 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.
21. It is common ground that the instant suit was filed despite the existence of a pending Judicial Review application filed by the Law Society of Kenya, Nairobi Branch. The only addition as far as the parties are concerned is the inclusion of Fred Matiangi, Cabinet Secretary, Interior and Coordination of National Government and Mr. Joseph Kinyua, Secretary to the Cabinet. The facts and reliefs sought are wholly if not substantially similar to the earlier suit.
22. The mere addition of a party or parties does not alter the pith and substance of the suit. The Black's Law Dictionary<sup>[7]</sup> defines *lis pendens*, as a Latin expression which simply refers to a "pending suit or action." The Oxford Dictionary of Law<sup>[8]</sup> defines the expression in similar terms. In the context of Section 6 of the *Civil Procedure Act*<sup>[9]</sup> 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.
23. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*<sup>[10]</sup> had occasion to pronounce itself on the subject of sub judice. It aptly stated: -
  - (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.

.....

24. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.<sup>[11]</sup>
25. In a fairly recent decision of this court, namely JR No. 146 of 2020, which incidentally involved the Law Society of Kenya, I stated that the words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue." Therefore, sub judice would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.
26. 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.
27. As the High Court of Uganda held in *Nyanza Garage v Attorney General*:-<sup>[12]</sup>

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”
28. ....
29. The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga*,<sup>[13]</sup> which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other. I find no justification at to sustain the instant suit. This position extinguishes Mr. Ochiel’s argument that the instant suit is filed under Article



22 of *the Constitution* and that it raises constitutional issues. A simple test would be whether this court can determine the issues raised in this case and allow or decline the prayers sought in these proceedings without delving into the issues pending in HCJR 010 of 2020 and that if the prayers sought are granted in the said case, whether they will have an impact on the instant suit.  
.....

37. Next, I will address the question whether this suit is an abuse of court process. As stated earlier, it is common ground that as at the time the instant suit was filed, the earlier suit was pending in this court. The earlier suit was filed by a branch of the applicant. There is no mention of the earlier suit at all in the pleadings. The question is whether this case which is strikingly similar to the earlier suit is an abuse of court process as Mr. Bitta submitted.
38. The court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. ....
39. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.<sup>[25]</sup> A litigant has no right to pursue paripasu two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.<sup>[26]</sup>  
.....
40. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse.<sup>[27]</sup> The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.<sup>[28]</sup>
41. I find that the applicant has presented the same issues which were being litigated in the earlier case. This suit presents a sad scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders. Similarly, this court is being invited to determine substantially similar issues pending before the court. The applicant did not disclose in its pleadings the existence of the earlier suit. This suit falls within the ambit of what constitutes abuse of court proceedings enumerated above. As stated earlier, the determination of the earlier suit will render the issues cited herein res judicata and decision will apply to the entire Law Society membership. This suit is struck off with no orders as to costs on grounds that it is an abuse of court process.

37. As aforesaid, I wholly agree with the sentiments above. In conclusion, I uphold the Defendants' contention that the matters raised and/or in issue this suit are also directly or substantially in issue or



have previously been in issue in Nairobi HCSC No. 493 of 1985. No persuasive reasons have been submitted to explain why the claims presented herein could not have been or cannot still be raised at the said Nairobi HCSC No. 493 of 1985.

Final  
Orders

38. In the end, I order as follows:

- i. The Preliminary Objection dated 6/04/2017 filed by the Defendant is upheld.
- ii. The Originating Summons dated 5/12/2016 and by extension, this entire suit is struck out.
- iii. Costs are awarded to the Defendants.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 14<sup>TH</sup> DAY OF JULY 2023**

.....

**WANANDA J.R. WANANDA**

**JUDGE**

