



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC No. 867B OF 2017

JOSEPH KIMATA WACHIRA.....1ST PLAINTIFF

KEMJE WINSTONE CO LTD.....2ND PLAINTIFF

VS

WILSON WAITHAKA GITAU.....1ST DEFENDANT

MUGO WAITHAKA.....2ND DEFENDANT

RULING

1. The Defendants raised the instant Notice of Preliminary Objection dated 29/9/2021 on grounds THAT;

a. There is a pending suit between the same parties over the same subject matter pending determination under NAIROBI ELC NO. 131 OF 2007 WILSON WAITHAKA GITAU VS KENYA WINSTON COMPANY LIMITED where the 1ST Plaintiff herein JOSEPH KIMATA WACHIRA was enjoined as an interested party and the sub judice rule applies.

b. This suit should be dismissed with costs.

2. On 6/10/2021, directions were taken to canvass the Preliminary objection orally on 2/11/2021. On the said date, the Plaintiffs' counsel was absent while the Defendants counsel had filed written submissions despite service and acknowledgement of the Preliminary Objection the Plaintiffs did not contest it.

3. In support of the Preliminary Objection, the Defendants filed their submissions dated 15/10/2021 through the firm of Nganga Ngige & Co Advocates. They reiterated the provisions of Section 6 of the Civil Procedure Act on subjudice on the grounds that the dispute between the 2nd Plaintiff and the 1st Defendant is pending in Nbi ELC No. 131 of 2007. That the 1st Plaintiff was enjoined in the said suit vide a Ruling dated 7/10/2014. The copy of the said Ruling was annexed.

4. The Defendant relied on the case of **Republic vs Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR**

Where the Court aptly pronounced itself on the subject of subjudice as follows;

“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.”

5. Equally in the case of **David Ndi & others vs Attorney General & Others [2021]eKLR** as quoted in **Kinatwa Cooperative Savings & Credit Society Limited Vs Kinatwa Prestige Limited (2021) eKLR** highlighted the rationale of the doctrine of subjudice which is to prevent subjecting a claimant to the vexatious and oppressive litigation concurrently in two Courts.

6. The main issue for determination is whether the Preliminary Objection on sub judice is merited in light of the foregoing.

7. The parameters for consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**.

8. The instant Preliminary objection impugns the Plaintiff's suit for being *Sub judice*. The legal provisions for subjudice are anchored in **Section 6** of the Civil Procedure Act as thus;

“6. Stay of suit

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.”

9. Elaborating on this doctrine, the Supreme Court in the Advisory Opinion in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR** at para 67 stated;

“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 subjudice 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.”

10. This suit was filed on the 15/12/2017. The Plaintiffs sought orders of eviction against the lessees / occupiers of the suit land and a permanent injunction against the Defendants from interfering with the suit land together with damages and costs of the suit. Alongside the suit the Plaintiffs filed an application for interim injunction which application was compromised on the 29/11/2018 by orders of status quo which meant that the Defendants were to remain in possession and were restrained from selling transferring and or alienating the suit land pending the hearing and determination of the suit.

11. The gist of the Preliminary Objection is that the instant suit is sub judice on account of Nbi ELC No. 131 of 2007 between **Wilson Waithaka Gitau vs Kenya Winston Co. Limited** (hereinafter referred to as the Nbi case) where the 1st Plaintiff herein was enjoined as an interested party. The Court Ruling dated 7/10/2014 is to the effect that the 1st Plaintiff having established his claim by way of sale agreement dated 26/5/2007 for purchase of LR No. 7418/30 was enjoined as an Interested Party. The said Ruling further alluded to another suit ELC 449 of 2009 involving the same parties whose proceedings had been stayed pending the outcome of ELC 207 of 2009.

12. In the present suit, the Plaintiffs pursuant to the plaint dated 15/12/2017 gave a history of suits pending and touching on LR No 7418/30 against the Defendants. The 1st Defendant herein is the Plaintiff in ELC No. 131 of 2007. The 2nd Defendant is the son of the 1st Defendant. Notably at para 10, 11 & 12 of the plaint the Plaintiff explained that the Nbi case the Plaintiff was found not to have established a prima facie case and the suit remains unprosecuted to date. That there was another case **ELC 297 of 2009 Wilson Waithaka Gitau vs Joseph Kimata Wachira** which was dismissed for want of prosecution.

13. It therefore follows that there are (were) 4 pending cases related to this matter as thus;

a. ELC 867B of 2017 – Joseph Kimata Wachira & Kenje Winstone Co Limited Vs Wilson Waithaka Gitau & Mugo Waithaka. In this suit the Plaintiffs are seeking the eviction of the Defendants.

b. ELC No 131 of 2007 – Wilson Waithaka Gitau Vs Kenje Winston Co Ltd. Joseph Kimata Wachira was enjoined as an Interested party on the 7/10/2014. In this case the Plaintiff is seeking declaratory orders that he is a bonafide purchaser and entitled to title of the suit land.

c. ELC 449 of 2009 Joseph Kimata Wachira & Kenje Winston Co Limited Vs Wilson Waithaka Gitau. This suit was stayed pending the outcome of ELC 131 of 2007. In this suit the Plaintiffs are seeking to evict and to restrain the Defendants from interfering with the suit land. The prayers in this suit mirror the prayers in the current suit.

d. ELC 297 of 2009 – Wilson Waithaka Gitau Vs Joseph Kamata Wachira. In this case the Plaintiff sought declaratory orders that he is the bonafide purchaser of the land. It is said that this suit was dismissed for want of prosecution.

14. Are the Plaintiffs abusing the process of the Court by filing multiplicity of suits? In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** Justice Mativo had this to say;

“The Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Blacks law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[22] The situations that may give rise to an abuse of Court process are

indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -

a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right.

d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.

e. Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[23]

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. [24]

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.[25] A litigant has no right to pursue 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.[26]** It matters not that the earlier suit was filed by the Branch of the LSK while the instant suit is filed by the main body.

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.[27] 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 interfere with the administration of justice.[28]

15. Going by para 13 of the Ruling there exists 3 cases pending between the parties with respect to the same subject matter and the same causes of action before concurrent Courts of competent jurisdiction. The causes of actions as I can glean from the pleadings revolve around a declaration of ownership by one party and eviction by the other. In the case of **David Ndi** aforesaid the Court was clear that the doctrine of subjudice as decreed in section 6 of the Civil Procedure Act is meant to cure such mischief. Other than subjecting a claimant to litigation in many foras of concurrent jurisdiction, costs of litigation, time consumed in litigating across Courts, there is the more serious matter of conflicting orders/decisions emanating from two or more Courts over the same matter causing undesired results of confusion and embarrassment to the Court and thus lowering its dignity and confidence in the eyes of the public.

16. It is trite that the remedy for a matter that is subjudice is to stay the suit. However in this case I am hesitant to take that action because it will not serve any purpose other than to clog the judicial system given the multiplicity of suits that have been filed by the parties as shown in paragraph 13 above. It is clear to the Court that the parties are already before the Court of law agitating their rights and it is totally unnecessary to maintain this suit. The parties must be redirected to the existing suits to litigate to their logical conclusion other than filing more suits hence abusing the judicial system.

17. In the absence of any opposition to the Preliminary Objection and given the reasons above the Preliminary Objection is upheld. The suit be and is hereby dismissed.

18. The Plaintiffs are condemned to pay costs.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF DECEMBER 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

1st and 2nd Plaintiffs absent but served see Affidavit of Service dated 9th December 2021

Ms. Wainaina holding brief for Mr. Ngige for 1st and 2nd Defendants

Ms. Phyllis – Court Assistant