



**Whitehorse Investments Limited v Attorney General & 5 others (Environment & Land Petition 16 of 2020) [2025] KEELC 141 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 141 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 16 OF 2020  
OA ANGOTE, J  
JANUARY 23, 2025**

**BETWEEN**

**WHITEHORSE INVESTMENTS LIMITED ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF FOREIGN AFFAIRS ..... 2<sup>ND</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**NAIROBI METROPOLITAN SERVICES ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL YOUTH SERVICE ..... 5<sup>TH</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. What is coming up before the Court is the 3<sup>rd</sup> Respondent's Notice of Preliminary Objection dated 13<sup>th</sup> May, 2024 objecting to the Petition on the grounds that:
  - i. This Honourable Court is divested of jurisdiction under Section 6 of the *Civil Procedure Act* to adjudicate on any aspect of the claim of the Petitioner herein as the Petitioner has an exact similar subsisting forum, vide the pending Nairobi HC ELC Constitutional Petition No 133 of 2017; Whitehorse Investments Limited vs Nairobi City County & Anor which is still pending adjudication before the ELC Court. These proceedings are patently therefore constitute an abuse of the Court process.
2. The Objection was canvassed by way of submissions. The 3<sup>rd</sup> Respondent/Applicant filed submissions in support of the Objection on the 4<sup>th</sup> June, 2024. Counsel submitted that the Applicant objects to the jurisdiction of this Court on account of Section 6 of the *Civil Procedure Act*, and that as affirmed



in *Owners of Motor vessel vs Caltex Oil (Kenya) Ltd (1989)* KLR 1, jurisdiction is everything without which a Court cannot make any step.

3. Counsel urged that the Petitioner has not disputed the existence of the ancillary proceedings to wit Nairobi ELC Pet No 133 of 2017; that the same was expressly admitted and further cited by the Court in ELC JR 12 of 2018; that there is therefore more than one suit, over the same subject matter being the Enforcement Notice No 6208 issued on the 14<sup>th</sup> December, 2017 by the Nairobi City County and that both suits are between the same parties or their representatives and are pending before the ELC, which is a court of competent jurisdiction.
4. Counsel submitted that as expressed by the apex Court in *Kenya National Commission on Human Rights vs Attorney General: Independent Electoral and Boundaries Commission & 16 Others (Interested Parties) [2020]* eKLR, the operative test of the applicability of the res sub judice bar is the subject matter and not the pleas sought. Further reliance in this regard was placed on the cases of *Kenya Bankers Association vs Kenya Revenue Authority [2019]* eKLR and *David Ndii & Others vs Attorney General & Others [2021]* eKLR.
5. It was asserted that the Applicant having established its Objection is entitled to costs pursuant to the elementary principle of costs follow the event set out in Section 27 of the *Civil Procedure Act*. Reliance in this regard was also placed on the cases of *Nyanjui & Another (Suing on their own behalf and as legal representatives of Arthur Nyanjui Gichui) vs Gitau [2022]* KECA 1382 KLR, *Kay Construction Limited vs ECO Bank Kenya Ltd & 60 Others [2015]* eKLR, *Rosaline Njeri Macharia vs Daima Bank Limited [2012]* eKLR and *Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others [2013]* eKLR.
6. The Attorney General, representing the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents indicated their support of the Preliminary Objection. However, he did not file submissions. The Petitioner did not file any submissions. [As at 25<sup>th</sup> September, 2024, having been granted 7 days to do so from 22<sup>nd</sup> July, 2024].

### **Analysis & Determination**

7. Having considered the Preliminary Objection, and the submissions thereto, the issues that arises for determination are whether the Preliminary Objection is competent and if so, whether the Preliminary Objection is merited.
8. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969)* EA 696 at 700 wherein Law, JA stated 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 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 the contract giving rise to the suit to refer the dispute to arbitration.”

9. Newbold, P further held:

“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 points by way of Preliminary



Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

10. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others* [2014] eKLR re-affirmed the principle as set out in the *Mukhisa Case*(supra) stating 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 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.”

11. In determining whether the 3<sup>rd</sup> Respondent’s Preliminary Objection passes this test, this Court will be guided by the exposition in the case of *Oraro vs Mbaja* [2005] eKLR where the Court 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 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 the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to 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 opposite side are correct. It cannot be raised if any fact is 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 and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

12. The Preliminary Objection taken by the 3<sup>rd</sup> Respondent is on the ground that the present matter is sub-judice. Sub-judice is a legal concept codified under Section 6 of the *Civil Procedure Act* which provides thus:

“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”



13. It is clear that the concept of sub judice goes to the jurisdiction of a Court and constitutes a pure point of law. The Court of Appeal in *John Florence Maritime Services Limited & Conken Cargo Forwarders Limited vs Cabinet Secretary for Transport and Infrastructure, Attorney General, Kenya Maritime Authority & Office De Gestion Du Freit Maritime (OGEFREM)* albeit discussing the related concept of res judicata, noted thus:

“There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.”

14. This Court finds that the question of sub judice is a proper preliminary objection.

15. As aforesaid the principle of sub judice as codified in Section 6 of the *Civil Procedure Act* prevents a Court from litigating a matter in which the issue is substantially in issue in another suit, before a competent court and between the same parties and/or their representatives.

16. Speaking to its rationale, the Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR* stated thus;

“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.”

17. The 3<sup>rd</sup> Respondent contends that the present suit is sub-judice Petition 133 of 2017, both of which are dealing with the aspect of the enforcement notice. No response has been made to this assertion.

18. The Court has keenly considered the pleadings before it and notes that vide the Amended Petition, the Petitioner concedes that it and the 3<sup>rd</sup> Respondent have previously engaged in litigation and one of the matters cited therein is Petition 133 of 2017. It is however averred that the subject matter is different. The Respondent has also referenced the impugned Petition in its Answer to the Petition. It is also noted that the matter has been referenced in JR 12 of 2018.

19. Despite the foregoing, none of the parties have annexed the pleadings in respect of the impugned Petition to enable the Court compare the same and determine whether the parameters of sub judice have been met. Going out of its way, the Court’s attempts to access the file/pleadings have been futile.

20. In the absence of the pleadings in Petition 133 of 2017, the Court is unable to make a determination on whether or not the sub judice rule has been contravened. In the circumstances the objection must fail.

21. The Preliminary Objection is found to be unmerited and is dismissed with costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**O. A. Angote**

**Judge**

In the presence of;

Mr. Marete for Petitioner

Mr. Allan Kamau for 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> – 7<sup>th</sup> Respondent

Mr. Kinyanjui for 4<sup>th</sup> Respondents

Mr. Ochieng for 3<sup>rd</sup> Respondent

Court Assistant - Tracy

