

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

CIVIL SUIT NO 45 OF 2017 (O.S)

RICHARD KIPLANAGAT SIGEI.....PLAINTIFF

VERSUS

GRACE SANG.....DEFENDANT

RULING

1. This ruling arises from a preliminary objection canvassed here by way of submissions filed by both sides on 7th November, 2019 and 25th February, 2020. The notice for the preliminary objection had been filed much earlier on 29th October, 2018. The objection was raised by the defendant – **GRACE SANG**- who, in essence, is contesting the filing of this matter here while a similar matter – **CMCC NO. 112 of 2014, KERICHO** – is still pending.

2. The notice of preliminary objection states that this suit as institutes is fatally defective, incontestably bad in law, incompetent and sustainable as the same is sub-judice. The suit was said to disclose no reasonable cause of action and was termed as an abuse of the court process. According to the defendant the suit should be struck out with costs.

3. As pointed out earlier, both sides filed submissions. It is clear that the plaintiff – **RICHARD KIPLANGAT ARAP SIGEI** – sued the defendant in the lower court seeking similar orders that he is seeking via this suit. That is why the defendant has invoked the sub-judice rule.

4. According to the defendant, the lower court matter is still pending. And because of this, this suit itself, being way similar to the one in the lower court, is caught up by the subjudice rule. The subjudice rule is spelt out at **Section 6** of the **Civil Procedure Act**, (cap 21) as follows:

6 “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 time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

5. The sub-judice rule is meant to prevent courts of concurrent jurisdiction from contemporaneously entertaining trial of two parallel suits in respect of the same subject matter. For it to apply, it is necessary that issues in the subsequent suit be also directly and/or substantially the same issues in the other suit. The remedies sought should also broadly be similar.

6. The defendant’s submissions are rich in substance but are hinged on one crucial fact: That the suit in the lower court is still pending.

7. The plaintiff’s submissions are essentially a denial of this fact. According to the plaintiff, the lower court matter was dismissed on 21st September, 2018. This suit itself was filed on 25th April, 2017. As pointed out earlier, the preliminary objection was filed on 29th October, 2018. What this seems to show is that by the time the preliminary objection was filed the lower court matter was no longer pending as it had already been dismissed for want of prosecution. Subjudice rule is about pending matters, not decided ones.

8. I think the defendant needed to do more. He alleged that the lower court matter is still pending. The other side averred that the matter was dismissed. It is trite law that if one side alleges a fact, and the other side denies it, that fact is not proved. The defendant needed to show that the record in the lower court does not show dismissal. He needed to demonstrate that the matter is still pending trial. He failed to do this and though his submissions are well articulated, the possibility is real that they are based on a non-existent fact.

9. As an aside, I would wish to point out that had the preliminary objection been raised earlier it is likely that it would have been upheld. I say this because what is on record shows that the lower court matter was similar to this one both in terms of the subject matter and the remedies sought. It would appear that this matter remained subjudice for a long time but the defendant did not take action quickly. And this is clear from the fact that this matter was filed way back in April, 2017 while the lower court matter was dismissed only in September 2018, that is almost one and a half (1 ½) years later. The defendant acted too late; otherwise her objection would have been spot on.

10. But as things stand now, the preliminary objection is for dismissal as it has not been well demonstrated that the lower court matter is still pending. And the preliminary objection is hereby dismissed.

Dated, signed and delivered at Kericho this 27th day of May, 2020.

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A. K. KANIARU

JUDGE