



**REPUBLIC OF KENYA**

**THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO 28 OF 2018**

**KENOL KOBIL LTD.....APPLICANT**

**VERSUS**

**DAVID MUGO NDUMIA**

**JAMES MWANGI NDUMIA**

**JULIA NYAGUTHI NDUMIA**

**MARY NJAMBI NDUMIA (sued**

**as the Administrators and legal**

**representatives of the Estate of**

**DANSON NDUMIA MUKURIA).....1<sup>st</sup> RESPONDENT**

**DAVID MUGO NDUMIA.....2<sup>nd</sup> RESPONDENT**

**JAMES MWANGI NDUMIA.....3<sup>rd</sup> RESPONDENT**

**JULIA NYAGUTHI NDUMIA.....4<sup>th</sup> RESPONDENT**

**RULING**

1. Before me for determination is a Preliminary Objection dated the 11<sup>th</sup> June 2018 and filed on the 12<sup>th</sup> June 2018 by counsel for the Defendant/Respondents herein in response to a suit and Application dated and filed by the Plaintiff/Applicant on the 31<sup>st</sup> May 2018.
2. The Application was disposed of by way of written submissions which was then highlighted on the 8<sup>th</sup> October 2018 in which the Defendant /Respondents submitted that the present suit was sub judice in view of the pending case in Nyahururu ELC No. 151 of 2017.
3. Their argument is that this matter relates to property LR No. 6585/506 situated in Nyahururu and owned by the Defendant/Respondents herein That the Plaintiffs were lessees of the property who filed suit against them vide Nyahururu ELC No. 151 of 2017 seeking for injunctive orders against them (Respondents) wherein the court advised them on the way forward but which, obiturn, the Plaintiff has ignored.
4. The Defendant/ Respondents' submission is to the effect that this present case is directly and substantially in issue with Nyahururu ELC No. 151 of 2017 and that the parties in both suits are the same or litigate under the same title.
5. That the Plaintiffs in Nyahururu ELC No. 151 of 2017 did not meet the threshold for the issuance of injunctive orders as the application was dismissed on the 5<sup>th</sup> May 2016 but have now filed a similar application litigating over the same issues save for the term 'mandatory' which has been included therein and a different counsel.
6. That the matter in issue in the present suit is the issue of an expired lease over land property LR No. 6585/506 which is substantially the main issue being litigated in Nyahururu ELC No. 151 of 2017 which suit is pending before court.
7. That the doctrine of sub judice is defined under the provisions of Section 5 and 6 of the Civil Procedure Act which bars *trials of suits or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit.*

8. The Defendant/ Respondents relied on the decided case in *John Silas Puleiy vs Jackson Karanja Muhiu [2016] eKLR* to buttress their submission.
9. The Defendant/ Respondents also submitted that the suit was misconceived given that it sought to enforce a lease that was nonexistence. It is trite law that for a lease to exist, it must be executed and registered. There was no such lease in existence.
10. That the matter was vexatious in that the Plaintiff cannot keep on filing new matters each time they are aggrieved before concluding a pending matter on the same issue.
11. That it was an abuse of the court process for the Plaintiff to seek to re-litigate the dispute in two courts of competent jurisdiction. The Respondents prayed for the subsequent suit to be strike out and dismissed.
12. The Application was opposed by the Plaintiff herein whose submission was that the matter before court was in respect to the preliminary objection dated 11<sup>th</sup> June 2018 in which the Respondents have submitted that the current matter as filed is sub judice. That Section 6 of the Civil Procedure Act is clear as to matters that are sub judice.
13. They contended that the two suits were not similar as the cause of action were substantially different. That while in suit No. ELC No 151 of 2017 pending before the court they had sought for an injunction similar to the present suit, the cause in case No. 151 of 2017 related to a lease that was executed on the 8<sup>th</sup> August 2000.
14. That in ELC No. 151 of 2017, the Hon Justice Sila had dismissed the same and advised the parties to negotiate the terms of a fresh lease. This was done and the negotiations cumulated into a lease which was executed on 19<sup>th</sup> April 2017. Their contention therefore was that there were two leases that are the cause of action in both cases.
15. Their further submission was that the cause of action in the present application was in the reference to the breach of terms of the lease agreement executed on 19<sup>th</sup> April 2017 and not that of 8<sup>th</sup> August 2000.
16. They opposed the preliminary objection because it did not fall within the threshold set in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** because for there to be a Preliminary Objection, the same ought to raise pure points of law which are not burdened by facts especially disputed facts that will call upon the court to interrogate before determining the said preliminary objection.
17. That there existed two leases was a disputed fact requiring the court to go on a fact finding mission to ascertain whether the causes of action in the two proceedings are similar or not. This in turn would breach the principal set out in the case of **Mukisa vs. West End Distributors**.
18. The Plaintiffs submitted that for this to be termed as a pure Preliminary Objection, it was mandatory that the Respondents raise the Preliminary Objection on the basis that the facts raised by the Plaintiff are correct and undisputed. The fact that the Defendant disputed that there was a new lease with new terms was enough to remove the preliminary objection from the threshold held in the case of **Mukisa Biscuits**.
19. The Plaintiff invited the court to consider their submissions and the authorities annexed thereto and come to the conclusion that the Preliminary Objection issued by the defendant on 11<sup>th</sup> June 2018 did not meet the threshold and ought to be dismissed and their application dated 31<sup>st</sup> May 2018 should be allowed to proceed and determined on its merits. The ruling set to be delivered on the 19<sup>th</sup> November 2018.
20. While awaiting for the ruling on the above case, the Plaintiff filed another application under certificate of urgency dated the 18<sup>th</sup> September 2018 wherein they sought to have the Respondents held in contempt of the court orders of maintaining the status quo issued on the 12<sup>th</sup> June 2018.
21. The court directed that service of the said application be effected and thereafter the application be heard inter-partes on the 15<sup>th</sup> October 2018 on which day the court was informed by counsel for the Respondents that he was not ready to proceed as they had just been served. The court then directed that the application dated 18<sup>th</sup> September 2018 be dispensed with by way of written Submissions which were to be filed within 7 days so that a combined ruling could be delivered.
22. As at the time I am writing this ruling, there are no submissions to the application dated 18<sup>th</sup> September 2018 for contempt of court orders that have been filed by either party. To this effect, I shall consider the application for contempt as abandoned.
23. I have considered the Respondent’s application on a point of Preliminary Objection to the effect that the suit should be struck out for contravening the provisions of Section 6 of the Civil Procedure Act.
24. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

*“---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”.*

25. The summation of the Defendant/Respondent’s Preliminary Objection is that this matter is directly and substantially in issue with a matter pending before court being Nyahururu ELC No. 151 of 2017 wherein parties in both suits are the same or litigate under the same title. That the same is therefore barred pursuant to Section 6 and 7 of the Civil Procedure Act.

26. The issue before the Court for determination is whether the Applicant’s Suit and Application is *sub judice* and in abuse of the process of court.

27. The Defendant/Respondent submitted that the Plaintiff/Applicant has raised matters similar as those raised in Nyahururu ELC No. 151 of 2017, matters arising between the same parties and the same subject matter.

28. To contextualize the Defendant/Respondents’ application on a point of Preliminary Objection, it is necessary to set out the relevant provisions of the Civil Procedure Act which they rely on and I set the same out hereunder:-

29. Sections 6 and 7 of the Civil Procedure Act prohibits a court from hearing a matter that is *sub judice* or *res judicata* 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.*

30. I have considered the submissions, the Authorities relied on as well as the pleadings in the Nyahururu ELC No. 151 of 2017 herein.

31. I note that the issue in dispute in the suit pending before court being Nyahururu ELC No. 151 of 2017 as in this present suit is the issue of a lease over land property LR No. 6585/506 which issue is between the same parties.

32. I also find that the issues raised in the application for injunction filed in Nyahururu ELC No. 151 of 2017 that was dismissed on the 5<sup>th</sup> May 2016 is similar to the present application filed on the 31<sup>st</sup> May 2018 seeking the same orders.

33. Although the Plaintiff contends that in as much as that is the position, yet the two suits relate to different leases and therefore a different cause of action, I find that this matter is directly and substantially in issue with the former suit No. Nyahururu ELC No. 151 of 2017 and therefore in breach of the provisions of Section 6 of the Civil Procedure Act.

34. The court will not allow parties to be filing a multiplicity of suits on the basis that they have found the previous suit (s) wanting either in content or form. The best way the Plaintiff ought to have dealt with this matter was to withdraw No. Nyahururu ELC No. 151 of 2017 so as to proceed with the present suit. *Sub judice* are principles that go to the core of rule of law as far as litigation is concerned.

35. In view of my finding that this suit offends the provisions of Sections 6 of the Civil Procedure Act, I am convinced that this is an appropriate case in which to exercise the drastic power of striking out. In the end, I strike out both the suit and application with costs to the Defendants.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of November 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**