



**Kulecho & another v Muchika & 2 others (Environment and Land Case E016 of 2024) [2025] KEELC 6506 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6506 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE E016 OF 2024  
A NYUKURI, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**ISAAC JAMES KUTOTO KULECHO ..... 1<sup>ST</sup> PLAINTIFF**

**HYSLOP ANDANJE KULECHO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**REUBEN MUCHIKA ..... 1<sup>ST</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**KAKAMEGA COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of Preliminary objection dated 28<sup>th</sup> October 2024 filed by the 1<sup>st</sup> defendant raising the following grounds;
  - a. That the entire suit is *sub judice* and it offends section 6 of the [Civil Procedure Act](#) as the matter in dispute herein between the parties herein is pending hearing and determination before Butali MCL & E No. 55 of 2020.
  - b. That the suit herein was instituted by the plaintiffs without them obtaining letters of grant of administration ad litem as is required of section 54 of the [Law of Succession Act](#).
2. The Preliminary objection was disposed by way of written submissions. Both parties filed written submissions. On each of those submissions, the parties attached several pieces of evidence. It is trite that evidence can only be presented in court under oath either orally or through a sworn affidavit. Therefore, the procedure adopted by parties herein of presenting evidence as an attachment to submissions is unknown in law as submissions are not made under oath and therefore cannot be the mode of



producing evidence. For that reason, the evidence attached to the submissions filed by the parties is hereby expunged from the court record and shall not be considered in the determination of the preliminary objection herein.

### **1<sup>st</sup> defendant's Submissions**

3. Counsel for the 1<sup>st</sup> defendant relied on section 6 of the *Civil Procedure Act* and the decision in the case of *Marselina Sbialila Ekesa v Bruno Patrick Murunga* (2018) eKLR and submitted that a court is by law precluded from trying the same issues between the same parties, if the same are subject of another pending suit.
4. On whether or not the plaintiff had grant of letters of administration, counsel argued that the plaintiff had no such document which position offended section 54 of the *Law of Succession Act*.

### **Plaintiff's Submissions**

5. Counsel for the plaintiff referred to section 6 of the *Civil Procedure Act* and submitted that the plaintiff filed Butali MCL & E No. 55 of 2020 in person, which suit had been withdrawn as the said court lacked jurisdiction to entertain the matter, hence the matter herein is before a court with jurisdiction. On that basis counsel argued that this suit is not *sub judice*.
6. On whether the plaintiff had filed suit without obtaining grant of letters of administration, counsel argued that the 1<sup>st</sup> defendant was misleading the court and was untruthful as the plaintiff had filed a grant of letters of administration dated 19<sup>th</sup> May 2023 among her list of documents dated 27<sup>th</sup> August 2024, where the plaintiff is named as the legal representative of the estate of Kulecho Luchebeleli. Counsel argued that the plaintiff had capacity to bring this suit.

### **Analysis and Determination.**

7. The court has carefully considered the preliminary objection herein as well as rival submissions filed. Two issues arise for the court's determination, namely;
  - a. Whether the preliminary objection filed herein is a proper preliminary objection; and
  - b. Whether the preliminary objection herein is merited.
8. It is trite that a preliminary objection is a pure point of law which is raised on the pleadings on the basis that all the facts relied upon are not disputed.
9. In the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 the court described what constitutes a preliminary objection 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”.

10. Therefore, the issue herein is whether a question of *sub judice* which is based on provisions of section 6 of the *Civil Procedure Act*, and the issue of capacity based on whether or not the plaintiff is in possession of grant of letters of administration, raise pure points of law which should be canvassed by way of a preliminary objection. Can a party prove *sub judice* and having or lacking grant of letters of administration without requiring evidence? A party raising a preliminary objection should raise it on the basis that it is predicated on agreed facts. They should not be looking to present evidence to persuade the court on the objection raised. Anything based on contested facts ought to be raised by way of an application supported by affidavit attaching the evidence in dispute.

11. In the case of *Kandara Residence Association & Another v Ananas Holdings Ltd & 4 Others; Director of Survey & 3 others (Interested Parties)* [2020] eKLR, where the court cited with approval the reasoning in *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* [2014] eKLR, the court held as follows;

“That restatement of the limited scope of a preliminary objection brings me to the point where I hold that the Preliminary objection by the 1<sup>st</sup> Defendant is not a true preliminary objection in the sense of the law. The issues of *res judicata*, duplicity of suits and suits having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objections. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.”

12. In the instant case, to support his preliminary objection, the 1<sup>st</sup> defendant attached evidence on the submissions, which evidence I have expunged from the record, because it was presented through a backdoor, and in a manner that is unlawful and unknown in law. The doctrine of *sub judice* is provided for in section 6 of the *Civil Procedure Act* 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.

13. Therefore, to prove *sub judice*, the following elements must be demonstrated;

- a. That there is a pending suit or proceeding in a court with competent jurisdiction to grant the relief sought in the current suit.
- b. That the issue in the pending suit or proceeding is also directly and substantially in issue in the current suit;
- c. That the parties in the pending suit or proceeding are the same parties or are privies of parties in the current suit.

14. It is therefore clear that the elements of *sub judice* cannot be proved through a preliminary objection. To prove *sub judice*, a defendant must provide pleadings in respect of a pending suit or proceeding showing that the suit or proceedings are between the same parties or their privies and raise the same issues in a competent court as a current suit. Evidence of a pending suit or proceeding cannot be presented as an



annexure to submissions. In addition, the issue of a pending suit is a matter that is contested by the plaintiffs in their submissions. Hence, a party cannot properly raise *sub judice* through a preliminary objection. They ought to file a notice of motion supported with an affidavit attaching the pleadings in regard to the alleged pending suit. In the premises, I find and hold that the question of *sub judice* having been based on contested facts is not a pure point of law worth of being raised through a preliminary objection.

15. On whether or not the plaintiff has grant of letters of administration, when in the instant case the plaintiff has pleaded that they have filed suit on behalf of the deceased's estate on the basis of grant of letters of administration, it is my view that, the fact that the plaintiff has a grant of letters of administration is already a contested averment hence the plaintiff cannot counter that proposition without filing evidence. A preliminary objection by its very nature ought not be countered by a replying affidavit with evidence. To allow a party to raise an issue through preliminary objection, which would necessitate a replying affidavit response from the opposing party would amount to prejudicing the right of the respondent.
16. For those reasons, I hold that similarly the question of whether or not the plaintiff has or does not have grant of letters of administration to file the instant suit ought to be raised by way of notice of motion and not through preliminary objection, hence the same is not a pure point of law.
17. In the premises, I find and hold that the preliminary objection dated 28<sup>th</sup> October 2024 is not a proper preliminary objection, and which I hereby strike out with costs to the plaintiff.
18. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Shaka holding brief for Mr. Manyoni for the plaintiffs

No appearance for the defendants

Court Assistant - Delphine

