



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of John Musyoka Musembi (Deceased) (Succession Appeal E043 of 2021) [2025] KEHC 13786 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION APPEAL E043 OF 2021**

EN MAINA, J

SEPTEMBER 25, 2025

IN THE MATTER OF THE ESTATE OF JOHN MUSYOKA MUSEMBI (DECEASED)

BETWEEN

PRISCILLA MUSYOKA MUSEMBI PETITIONER

AND

FREDRICK KINYUNGU NGONZI RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 16th April, 2025 which seeks a temporary injunction to restrain the respondent, his relatives, agents, servants and/or contractors from entering, remaining, fencing, putting up structures, digging holes, cultivating, ploughing, terracing, planting trees or crops, grazing, cutting down trees, clearing natural vegetation or in any other whatsoever intermeddling with parcel number Machakos/Mua Hills/154 pending hearing of the application and the cause herein. The applicant has also sought an order that the OCS Machakos Police Station and the OIC Mua Hills Police Post be directed to ensure compliance with the orders once issued.
2. In the supporting affidavit sworn on 16th April, 2025 the Applicant deposes that whereas the respondent is not a beneficiary of the estate, he has been adamantly intermeddling with parcel No Machakos/Mua Hills/154 by entering, remaining, fencing, putting up structures, digging holes, cultivating, ploughing, terracing, planting trees or crops, grazing, cutting down trees, clearing natural vegetation. That the deceased and the respondent, entered into a sale agreement for a portion measuring 15 acres out of LR NO Machakos/Mua Hills/154 at an agreed purchase price of Kshs 24,750,000 payable within 90 days from the date of the agreement but the respondent breached the agreement by failing to pay the full purchase price; that nevertheless the respondent illegally trespassed into the aforesaid parcel of land and hived and fenced off a big portion thereof and unlawfully constructed a temporary structure. The applicant contends that as a result he continues to suffer irreparably without any justifiable cause.



3. By a replying affidavit sworn by on 12th May 2025 the Respondent deposes that the application is frivolous, vexatious, incompetent and an abuse of the court process as the subject matter is similar in substance and form to an application filed by the Applicant in Machakos ELC No 27 of 2020 and there is also a pending appeal in Nairobi Civil appeal No E 413 of 2022. The respondent further deposes that until the demise of the deceased he had paid Kshs.14,950,000/- out of the agreed consideration of Kshs 24,750,000/- and that there was an arrangement between him and the deceased which the Applicant was aware of albeit he still proceeded to file an application in the ELC.

Submissions

4. Learned counsel for the Applicant submitted that the respondent's intermeddling with the parcel NO Machakos/Mua Hills/154 will automatically hinder the proper administration and distribution of the estate to the rightful beneficiaries. Counsel urged that the application be allowed as prayed.
5. In response, Counsel for the Respondent, submitted that this court lacked jurisdiction to entertain the application as it was res judicata as similar orders had been sought before the ELC and were granted. Reliance was placed to the cases of Peter Nganga Muiruri v Credit Bank Limited & 2 Others [2008] eKLR, In the Estate of Alice Mumbua Mutua (deceased) [2017] KEHC 8289(KLR), Adome v Ogutu [2024] KEHC 7682(KLR) and Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
6. On the issue of the application being sub judice, reliance was placed on Section 6 of the Civil Procedure Act and the case of Kenya National Commission on Human Rights v Attorney General: Independent Electoral & Boundaries Commission & 16 others [2020] eKLR. Counsel submitted that there was more than one suit over the same subject matter and hence this application violates the sub judice rule and should be struck out. It was also argued that any question as to whether the property forms part of the estate should await the proceedings for the confirmation of the grant. Counsel asserted that the respondent is not an intermeddler but a purchaser whose claim should be settled in a civil court as opposed to a probate court.

Determination and Analysis

7. This court has considered the application, the responses thereto, the submissions of the parties, the cases cited and the law. The gravamen of this application is that the respondent has occupied land which belonged to the deceased unlawfully because he did not pay the full purchase price agreed between him and the deceased. The applicant therefore considers him to be an intermeddler who should not be carrying out any activities on the land. There is however evidence that this very issue was litigated in the Environment and Land Court (ELC) in Machakos and that there is a pending appeal in the Court of Appeal touching on the same issue.
8. It is trite that this court would have no jurisdiction to hear a case where the same parties are litigating on the same issue in another court. It behoves the Applicant, to execute the orders obtained in the ELC rather than seek similar orders in this or a different court. Bringing a similar application here is a violation of the sub judice rule.
9. There is a long line of cases on what constitutes sub judice. For instance, in the case of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR) the court 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 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.”

10. Similarly, in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] KEHC 10142 (KLR) the court stated;

“At the risk of repeating myself, for the doctrine of sub judice to apply the following principles ought to be present:-

- (a) There must exist two or more suits filed consecutively;
- (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga,^[13] which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other”(emphasis added).

11. Applying the above principles here, I find and hold that this application offends the sub judice rule. Filing multiple cases/applications on the same matter against the same party, even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se.
12. The upshot is that this application is an abuse of the court process. It is struck out with costs to the respondent.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER 2025.

E. N. MAINA

JUDGE

In Presence of:

Mrs Nzau, Advocate for the Applicant.

Ms.Wanjiru, Advocate for the Respondent.

Mr. Mutemi for Mr. Simba, Advocate for the Protestor.

Geoffrey Court Assistant/Interpreter.

