

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC LC NO. E009 OF 2025

JANE WANJIRU NGARUIYA
PLAINTIFF/RESPONDENT

VERSUS

VINCENT NJOGU KIHUGA1ST
DEFENDANT/RESPONDENT

ANTHONY KIMANI KIHUGA 2ND
DEFENDANT/RESPONDENT

PETER KIBIRA KIHUGA 3RD
DEFENDANT/APPLICANT

MICHAEL KINYANJUI KIHUGA 4TH
DEFENDANT/APPLICANT

RULING:

1. Vide a Notice of Motion dated 7th May, 2025, the 3rd and 4th Defendants/ Applicants sought the following orders, THAT: -
 1. The Plaintiff/Respondent's suit be struck out in Limine for being sub-judice, failing to disclose any reasonable cause of action and being an abuse of the court process.
 2. The Plaintiff's plaint be struck out for failing to comply with the provisions of the Civil Procedure Rules and on the ground that the verifying affidavit contains false, scandalous and offensive matter.
 3. Costs of the application and the suit be borne by the Plaintiff/Respondent.
2. The application is premised on the 5 grounds on its face, the 4th Applicant's Supporting Affidavit evenly dated and on the Supplementary Affidavit dated 19.09.2025, on his own behalf

and on behalf of the 3rd Defendant/ Applicant. He dismissed the Plaintiff's suit as being incompetent, baseless, frivolous, scandalous, misconceived, misadvised, without merit and an abuse of the court process as the same does not disclose any reasonable legal and/or factual ground to warrant the grant of the orders sought.

3. It is his contention that the plaintiff's husband, one Ngaruiya Kamau, prior to his demise, filed a suit against Samuel Kihuga (the personal representative of the estate of Tabitha Waithaka) seeking a determination of the claim of land parcel known as Eldoret Municipality Block 12/184 vide Eldoret High Court civil case No. 338 of 1997, which he maintains is still an active file before a court of competent jurisdiction.
4. It is therefore his claim that the plaintiff herein failed to disclose that a previous suit exists and as such the instant suit goes against the rules of sub judice. He thus deponed that the plaintiff's suit is tainted with dishonesty, misrepresentation with a deliberate attempt to mislead the court. He maintained that the plaintiff has approached the court with unclean hands.
5. On the plaintiff's failure to disclose material facts, he deponed that the Partnership Agreement dated 16.10.1981 referred to by the plaintiff is non-enforceable, null and void since the same refers to land that was opened in the year 1983.

6. That in the year 1981 the suit parcel of land was still government land and thus the late Ngaruiya Kamau and the late Tabitha Waithera could not enter into an enforceable agreement over it. That therefore, the Partnership Agreement dated 16.10.1981 is null and void.
7. Further, that the Partnership Agreement dated 16.10.1981 refers to land reference No. Eldoret Municipality Section 2 No. 45 and which has no nexus with the suit land herein known as Eldoret Municipality Block 12/184.
8. In conclusion, he maintained that the instant suit is an abuse of the court process and urged the court to allow the application and strike out the plaintiff's suit.
9. The application was opposed. The Plaintiff/Respondent filed a Replying Affidavit sworn on 17th September, 2025 in response to the averment made in the application. She dismissed the application as being misconceived, devoid of merit and based on false allegations designed to frustrate her legitimate claims.
10. She averred that she has not misrepresented any material facts as alleged by the applicants and maintained that her claim is based on valid and subsisting legal rights.
11. It was also her contention that there is no other pending suit between the parties herein in respect of the same subject matter as stated in the plaint and therefore the allegation by the applicants that she failed to disclose a previous suit is unfounded.

12. She deponed that the Partnership Agreement dated 16.10.1981 was validly entered into by the parties and forms the basis of the co-ownership of the suit property and thus the same cannot be said to be void. That the said agreement specifically refers to the suit land known as Eldoret Municipality Block 12/184.
13. She relied on the decision in the judgment issued on 11.10.2024 in High Court Succession Cause No. 34 of 2007 and Succession Cause No. 85 of 2007, wherein it was held that she was entitled to half (1/2) portion of the suit land known as Eldoret Municipality Block 12/184, which decision was arrived at after the due process of law.
14. She also stated that the applicants' allegations about the previous court proceedings are irrelevant as they do not relate to the instant suit. It was her argument that the present suit arises from the succession proceedings and the decision of the succession court issued on 11.10.2024.
15. She further argued that her claim is not time-barred as it is founded on the recent decision of the Succession court delivered on 11.10.2024 and maintained that she has the requisite locus standi to institute the instant suit as the duly appointed administrator of the estate of the late Ngaruiya Kamau.
16. She deponed that the applicants' occupation of her portion of the suit land is illegal, without any legal justification especially following the decision by the succession court which clearly established her rights to half portion of the suit

land and as a result, she continues to suffer substantial loss from the applicants' use of her property and loss of rental income. She therefore urged the court to dismiss the application with costs.

17. The 3rd and 4th Defendants/ Applicants filed a Supplementary Affidavit sworn by the 4th applicant and dated 19.09.2025 in response to the Replying Affidavit. He dismissed the replying affidavit as being fatally defective, incurable and ought to be struck out with costs.
18. He reiterated the contents of paragraph 2 - 14 of his supporting affidavit in response to the contents of paragraph 3- 16 of the replying affidavit.
19. It is his contention that the plaintiff/respondent has not denied the existence of Eldoret High Court Civil Suit No. 338 of 1997 and in addition has not even informed the court of the decision in the previous suits.
20. He further contended that the plaintiff has not bothered to demonstrate the nexus between land reference No. Eldoret Municipality Section 2 No. 45 and Eldoret Municipality Block 12/184. He thus urged the court to strike out the replying affidavit and allow the application with costs.
21. The Application was canvassed by way of written submissions. Both parties filed their rival submissions. The applicants filed their submissions dated 19.09.2025 together with authorities while the Respondent filed her submissions and authorities dated 19.09.2025, which I have read and considered.

22. I have carefully considered the application, the affidavit in support and the supplementary affidavit together with the annexures thereto, the replying affidavit and the annexures therein and the rival submissions filed. Consequently, it is my considered view that the following issues arise for determination: -
- i. Whether the plaintiff's suit offends the doctrine of sub-judice.
 - ii. Whether the applicants have met the threshold to warrant the striking out of the plaintiff's suit.
 - iii. Who shall bear the costs of the application.

Whether the plaintiff's suit offends the doctrine of sub judice;

23. The law on the doctrine of sub judice is found under section 6 of the Civil Procedure Act which provides 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." (emphasis added)

24. The Supreme Court in the case of **Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR** while discussing the doctrine of sub judice stated as follows: -

“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 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 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.”

25. Guided by the above decision, it is settled that the principles or elements to be established in a claim of sub judice are as follows: -
- a) That there is more than one suit over the same subject matter;
 - b) That one suit was initiated before the other;
 - c) That both suits are pending before courts of competent jurisdiction;
 - d) That both suits are between the same parties or their representatives.
26. The applicants contend that the plaintiff's husband, Ngaruiya Kamau, prior to his demise, filed a suit against Samuel Kihuga (the personal representative of the estate of Tabitha Waithaka) seeking a determination on a claim of ownership over a parcel of land known as Eldoret Municipality Block 12/184 vide Eldoret High Court civil case No. 338 of 1997. It is their claim that the said case is still an active file before a court of competent jurisdiction hence the present suit offends the doctrine of sub judice. They annexed a copy of the plaint in HCCC No. 338 of 1997.
27. The respondent on the other hand dismissed the allegations that the suit offends the provisions of section 6 of the Civil Procedure Act. She contends that her claim is based on valid and subsisting legal rights, that there is no suit pending between the same parties and further that the allegations about the previous court proceedings are irrelevant as they do not relate to the current matter.

28. In determining whether the present suit is sub judice or not, this court will be guided by the statutory provision as well as the Supreme court decision above. The first element to be established is whether there is more than one suit over the same subject matter.
29. It is common ground that there exists two suits; HCCC No. 338 of 1997 and the instant suit. The applicants annexed a copy of the plaint marked 'MKK-2' in HCCC No. 338 of 1997 in support of the said averments. From a cursory look at the said copy of plaint, it is evident that both suits are in respect to parcel of land known as Eldoret Municipality Block 12/184 previously Eldoret Municipality Section 2 No. 45 and which is the subject matter in the present suit.
30. It is also not in contest that the HCCC No. 338 of 1997 was instituted before the present suit, which was only instituted this year. Consequently, the question that follows is whether both suits are pending before courts of competent jurisdiction.
31. This court has taken the liberty to call for the said file HCCC No. 338 of 1997. From a perusal of the proceedings therein, I have taken note that the matter was last before the High Court on 06.03.2006. On the said date, the court issued an order that the application for revocation in P & A No. 146 of 1994 be heard and marked the matter as S.O.G.
32. In essence therefore, it is clear that the said matter HCCC No. 338 of 1997 despite being marked S.O.G, is still an active matter, the same has never been dismissed. I must

also state that at the time of filing the said suit in the year 1997, the High Court was vested with the requisite jurisdiction to entertain and determine the said dispute between the parties as filed. However, upon the establishment of the Environment and Land court, parties were under a duty to make the necessary application and have the matter transferred before the Environment and Land court.

33. The next element to establish is whether both suits are between the same parties or their representatives. It is not in dispute that the plaintiff in the instant suit has filed the suit as an administrator of the estate of the late Ngaruiya Kamau. This fact is contained at paragraph 4 of the Plaint dated 30.01.2025. It is also common ground that the said Ngaruiya Kamau was the plaintiff in HCCC No. 338 of 1997 as seen on annexure 'MKK-2'. The Defendant is Samuel Kihuga who was sued as the personal representative of the estate of Tabitha Waithera (deceased).
34. The defendants in the instant suit have also been sued in their capacity as the Administrators of the estates of the late James Samuel Kihuga Chege and the late Tabitha Waithera Kamau. This is contained at paragraph 2 of the plaint dated 30.01.2025.
35. Therefore, in view of the foregoing, it is clear that both suits are between the same parties and/or their representatives claiming under them in the same capacity.

36. The final element which needs to be established is whether the matter in issue in the present suit is also directly and substantially in issue in a previously instituted suit. In the case of **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR**, the court held as follows:

“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 looking at the pleading in both cases.”

37. I have carefully and critically looked at the plaint dated 14.07.1997 in HCCC No. 338 of 1997 as well as the plaint in the instant suit dated 30.01.2025. It is essential to note that both suits relate to the same subject matter, being land parcel known as Eldoret Municipality Block 12/184, over an ownership claim of half (1/2) portion of the said parcel. Further, in both suits, the genesis of the ownership claim arises from the partnership agreement dated 16.10.1981. This fact is contained at paragraph 6 of the Replying Affidavit dated 17.09.2025 and on the copy of the plaint annexed to the supporting affidavit and marked as ‘MKK- 2’.

38. It is also important to point out that the reliefs sought in both suits are similar. In both, the plaintiffs are seeking declaratory orders that they are the beneficial owners of half portion of the suit land and are hence entitled to the same.

39. In conclusion therefore, it is the finding of this court that the instant suit as filed by the plaintiff/respondent offends the doctrine of sub judice. The applicants have sufficiently

established all the necessary elements in a claim under sub judice to the required standard.

Whether the applicants have met the threshold to warrant the striking out of the plaintiff's suit;

40. The applicants have urged this court to strike out the plaintiff's suit with costs on account of sub judice and further that the suit has failed to comply with the provisions of the Civil Procedure Rules, and that the verifying affidavit contains false, scandalous and offensive matter.
41. It is well settled that striking out of pleadings is a draconian act that should only be applied in clear and plain cases. The Court of Appeal in the case of **The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No. 54 of 1999)** stated as follows: -

“ Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”

42. The grounds outlined by the applicants as the basis of striking out the plaintiff's suit, particularly that the partnership agreement dated 16.10.1981 is unenforceable, null and void as it relates to land that was opened in the year 1983 is not a matter that can be determined at an interlocutory stage.
43. To determine whether the suit does not raise any reasonable cause of action against the defendants/applicants would require the parties to adduce evidence in support of their claims and an evaluation of the said evidence and which cannot be done at an interlocutory stage.
44. Moreover, a triable issue is not necessarily one that would ultimately succeed but one that is prima facie bona fide. Thus, it is the finding of this court that the plaintiff's suit cannot be struck out for the reasons outlined by the applicants.
45. However, having held that the plaintiff's suit offends the doctrine of sub judice, it would be appropriate if the present suit, which was filed later, to be stayed pending the determination and/or direction to be made in the earlier suit HCCC No. 338 of 1997.
46. In the premises, it is my finding that the applicants have partially proved their application to the required standard.

Who shall bear the costs of the application;

47. It is well settled that costs follow the event unless the court directs otherwise.

48. In this case, having held that the application is partially merited, I find that the applicants are entitled to the costs of the application.

CONCLUSION:

49. In view of the foregoing, I find that the Notice of Motion Application dated 7th May, 2025 by the 3rd and 4th Defendants/ Applicants is **partially merited** and is hereby **allowed** on the following terms: -

a) The present suit be and is hereby stayed pending the outcome and/or directions in HCCC No. 338 of 1997 on account of being sub judice.

b) Costs of the application to be borne by the Plaintiff/ Respondent.

50. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **ELDORET** this **16TH** day of **OCTOBER, 2025.**

HON. C. K. YANO
ELC, JUDGE

Ruling delivered in the virtual presence of: -

_____ for the Plaintiff/Applicant

_____ for the Defendant/Respondent

Court Assistant - Laban