

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. E038 OF 2023

JAMES MWANGI WAGURA 1ST

PLAINTIFF

LUCY WARUGURU WAGURA 2ND

PLAINTIFF

VERSUS

KIAMBU COUNTY GOVERNMENT 1ST

DEFENDANT

HON. KENNEDY ODHIAMBO 2ND

DEFENDANT

RULING

Introduction

1. This Court is called upon to determine the Preliminary Objection by the 2nd Defendant dated 29th September 2023 which *inter alia* challenges the jurisdiction of this court asserting that the suit filed offends the doctrines of sub judice and res judicata, and an application dated 6th October 2023 which seeks the following Orders:

1. *Spent..*
2. *THAT the Plaintiff's Notice of Motion dated 15th August 2023 and the entire suit be struck out and/or stayed until the hearing and final determination of Thika ELC NO. E025 of 2023. (sic)*

3. *THAT the costs of this application be awarded to the Defendants*

2. The application is premised on the grounds of the face of it and the supporting affidavit of Kennedy Odhiambo sworn on even date.
3. At the heart of both the Preliminary Objections and the application lies a singular question of law and judicial propriety: whether the Plaintiff's suit may lawfully proceed, or whether it must yield to the settled principles that prevent multiplicity of litigation and protect the integrity of pending proceedings.
4. The Court is thus called upon to examine not only the legal foundation of the doctrines invoked, res judicata and sub judice, but also the facts and circumstances underpinning the Plaintiff's claims, to determine whether the continuation of this suit is permissible under the law.
5. Both the preliminary objection and the application were canvassed by way of written submissions.

Issues for Determination

6. Having looked at the Preliminary Objection, the application the Grounds of opposition in response, the parties' written submissions and the relevant authorities, the following issue emerge for determination:

i. Whether the Preliminary Objection is merited

ii. Whether the application to strike out the suit is merited

Analysis and Determination

7. I will first examine the Preliminary Objection. It is well settled that a Preliminary Objection must raise a pure point of law, one which, if upheld, disposes of the suit without recourse to evidence or trial of contested facts.

This principle was articulated in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, where the Court of Appeal emphasized that such a Preliminary Objection is appropriate only when the matters challenged are plainly discernible on the face of the pleadings.

8. The Preliminary Objection effectively asserts that the matter is sub judice and an abuse of the court process. That the issues for determination in this suit are similar to those of Milimani ELC 160 of 2021 and that the parties are substantially the same.
9. Section 6 Civil Procedure Act codified the doctrine of *sub judice* in the following terms:

“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.”

10. Effectively, a court confronted with a subsequent suit that mirrors issues already pending before it or another court is prevented by statute from embarking on the trial of the latter suit.
11. The doctrine of sub judice, is a foundational principle of procedure that prohibits this Court from proceeding with the trial or hearing of any matter that is already before another Court or Judge. Its purpose is to prevent the multiplicity of suits on the same issue and to ensure uniformity and consistency in the administration of justice.
12. In ***Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others [2020] eKLR***, the Supreme Court of Kenya had occasion to consider the scope and effect of the doctrine 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 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.”

13. Learned counsel for the Plaintiff submits that the Preliminary Objection is not based on pure points of law and requires the Court to examine factual issues relating to: similarity of the parties, validity of the allegations of fraud and whether the Plaintiff exhausted all statutory remedies.
14. The Court observes that a Preliminary Objection must raise a pure point of law, capable of disposing of the suit without delving into disputed facts. Where resolution requires assessment of factual matters the objection ceases to be purely legal and may not succeed at this interlocutory stage.
15. As established in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, a Preliminary Objection that necessitates such factual inquiry is inappropriate for determination at this stage.
16. Consequently, the Court finds that the Plaintiff’s objection to the Preliminary Objections on this ground is well-founded.
17. Accordingly, the Preliminary Objection by the 2nd Defendant dated 9th September 2023 fails.

18. The court now turns to the substantive application dated 6th October 2023 which seeks that the entire suit be struck out and/or stayed until the hearing and final determination of Thika ELC No. 29B of 2023.
19. The application has similarly invoked the doctrine of *sub judice* and *res judicata*.
20. The Court has already addressed the contours of the *sub judice* doctrine in determining the Preliminary Objections. Those principles remain unchanged, but the evidentiary burden on an applicant seeking the drastic remedy of striking out a suit is considerably heavier. It requires the applicant to place before the Court the pleadings or record of the alleged earlier matter to demonstrate, with precision, that the present suit revisits issues already pending or previously determined.
21. The companion doctrine of *res judicata*, as codified under Section 7 of the Civil Procedure Act, provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

22. This provision effectively bars the re-litigation of matters finally adjudicated between the same parties or their privies.
23. The court has taken the time to scrutinize the annexed documents and noted that at pages 119 and 149, it clear that the Replying Affidavits are filed in Nairobi Milimani ELC Case No. 160 of 2021. The prayers sought in both the instant suit and Milimani ELC Case No. 160 of 2021 which is now Thika ELC No. 29B of 2023 are strikingly similar as they seek the Court to determine the ownership of the suit property herein even though Thika ELC Case No.29B of 2023 mentions more parcel numbers.
24. The doctrine of *res judicata* is not engaged on the facts before the Court, and it requires no further elaboration in this determination.
25. The Court therefore turns to the remaining question, namely whether the suit offends the doctrine of *sub judice*.
26. As espoused hereinabove, the doctrine of *sub judice* exists to shield the judicial process from the perils of parallel litigation and to forestall inconsistent findings on the same subject matter.
27. Notably, Section 6 of the Civil Procedure Act employs the phrase “matter in issue” rather than “subject matter,” a distinction that is neither accidental nor semantic. The Court in ***Kenya Bankers Association v Kenya Revenue Authority [2019] eKLR*** underscored this point, observing that although the prayers in parallel suits may appear distinct, what the doctrine interrogates

is the identity of the issues for determination. The Court aptly stated:

“A cursory look at the prayers sought in this case shows that they relate to the same subject matter. However, the principle of sub judice does not talk about the ‘prayers sought’ but rather ‘the matter in issue’. I find that the matters in issue in the suits are substantially the same.”

28. Upon considering the material placed before the Court, it is evident that Thika ELC No. 29B of 2023 engages issues that substantially mirror those presented in this suit as it concerns the ownership of the suit property herein and the parties, in substance, are largely the same.
29. However, while the record discloses sufficient parallelism to trigger the statutory bar, it does not meet the high threshold necessary to justify the draconian step of striking out the suit.
30. Order 2, Rule 15 of the Civil Procedure Rules sets out the principles that guide courts in the exercise of their power to strike out pleadings or suits. It provides that:

“15.(1)At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a) it discloses no reasonable cause of action or defence in law; or*
- b) it is scandalous, frivolous or vexatious; or*

c) *it may prejudice, embarrass or delay the fair trial of the action; or*

d) *it is otherwise an abuse of the process of the court...and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

31. The Court in ***Kamara v Galana Oil Kenya Ltd (Civil Appeal 333 of 2015) [2023] KEHC 21537 (KLR)*** cautioned that striking out and adopted the finding by the Court of Appeal in ***D. T. Dobie & Co Ltd v Muchina and Another [1982] KLR 1*** which held that the power to strike out suits is drastic and should be exercised with great circumspection and only in the clearest of cases where amendment cannot cure the defect.
32. Indeed, striking out is an exceptional remedy, and where *sub judice* is established, a stay is ordinarily the proper course to preserve the authority of the court first seized of the dispute.
33. In the present matter, the record does not disclose any pleading so manifestly defective as to warrant the extreme step of striking out.
34. Accordingly, the Court declines to strike out the Plaintiff's suit. Instead, it will grant a stay of these proceedings pending the final determination of Thika ELC No. 29B of 2023.
35. In the premises, I issue the following Orders:

- i. The Preliminary Objections dated 29th September 2023 is dismissed.***
- ii. The Application dated 6th October 2023 is partially allowed as follows:***
 - a. The suit is hereby stayed pending the hearing and final determination of Thika ELC No. 29B of 2023.***
- iii. The Costs of the application shall be in the cause.***

Dated, Signed and Delivered, at Thika this 2nd day of December 2025

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**J. M. ONYANGO
JUDGE**

In the presence of:

- 1. Ms Mwangi for Mr Kimani for the Plaintiff**
- 2. No appearance for Nyakundi for the Defendant**

Court Assistant: Hinga