

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**  
**ELCLOS NO. E012 OF 2025**

**GRACE**

**KWAMBOKA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ABDULBARI**

**BARRE**

**ABDIRAHMAN.....DEFENDANT/APPLICANT**

**RULING**

1. Before this court for determination is the notice of preliminary objection dated 28<sup>th</sup> December, 2025 and the notice of motion dated 11<sup>th</sup> February, 2026 respectively. The notice of preliminary objection is filed by the defendant/applicant in opposition to the originating summons dated 24<sup>th</sup> February, 2024 challenging the same on the following grounds:-

***1. That the suit is res sub judice under Section 6 of the Civil Procedure Act as there is a suit on the same subject matter pending determination under MCELC/ E029/2021 Abdulbari Barre Abdirahman v Grace Kwamboka before Hon. Pamela Achieng (CM), where the applicant/respondent's cause of action borders adverse possession as contained in the applicant/respondent's statement of defence and counterclaim dated 22<sup>nd</sup> July, 2021.***

2. ***That the issues as filed in the originating summons dated 3<sup>rd</sup> June, 2025 and as filed before this court are directly and substantially at issue in Nairobi, MCELC/E209/ 2021 Abdulbari Barre Abdirahman v Grace Kwamboka as filed by the applicant/respondent's in its statement of defence and counterclaim dated 22.7.2021 and that the issues directly and substantially at issue in this suit shall be ventilated, litigated, heard, determined and settled by the trial court in MCELC/E209/ 2021 Abdulbari Barre Abdirahman v Grace Kwamboka before Hon. Pamela Achieng (CM).***
  
3. ***That the statement of defence and counterclaim dated 22<sup>nd</sup> 2021(sic) is res sub judice under Section 6 of the Civil Procedure Act as Hon. Pamela Achieng (CM) has already given directions on the disposal of the counterclaim in light of the notice of preliminary objection dated 26<sup>th</sup> January, 2025 which is the subject of dispute in the current matter and suit. The respondent/applicants notice of preliminary objection to the respondent's counterclaim is slated for ruling on 19<sup>th</sup> March 2026 before Hon. Pamela Achieng (CM).***

4. *That the issues canvassed in the applicant/respondent's statement of defense and counterclaim dated 22<sup>nd</sup> January, 2021 and those as framed in the applicants originating motion dated 24<sup>th</sup> February, 2024 are res sub judice by dint of Section 6 of the Civil Procedure Act as the same relates to an adverse possession claim over the land reference number 209/10966 that is currently pending before the trial court by dint of the applicant/respondent's counterclaim dated 22<sup>nd</sup> July, 2021.*
5. *That the applicant/defendant's suit and application before this court is a deliberate abuse of the court process by invoking a multiplicity of suits of proceedings for the collateral purpose of imputing an otherwise lawful process of obtaining judgment in its favour over while at the same time trying to evade to prosecute its counter claim dated 22<sup>nd</sup> July, 2021 that borders on adverse possession and couched in similar to the current originating summons before the court.*
6. *That in the circumstances, the applicant/respondent's application dated 24<sup>th</sup> February, 2025 and suit and the orders/prayers sought therein are a*

*monumental procedural and legal nullity, abuse of the court process, vexatious, mischievous and a proper candidate for dismissal and/or striking out with costs limine.*

*7. That the respondent/applicant prays that based on the above, the honourable court makes a finding that it lacks the requisite jurisdiction to hear and determine the case, and originating summons application as filed and have the same struck with costs to the respondent (sic).*

2. The defendant filed the notice of motion dated 11<sup>th</sup> February, 2026 expressed to be brought under **Section 6** of the **Civil Procedure Act** seeking the following orders:-

*1. Spent.*

*2. That the originating summons dated 24<sup>th</sup> February, 2024 be and is hereby dismissed/struck out in its entirety for being res sub judice owing to the existence of Nairobi MCELC/ E209/ 2021 Abdulbari Barre Abdirahman v Grace Kwamboka.*

*3. The originating summons dated 24<sup>th</sup> February, 2026 is an abuse of the process of the court and should be struck out for lack of jurisdiction*

***and for contravening the res subjudice doctrine.***

***4. Costs of the application be provided.***

- 3.** The application is premised on the grounds on its face. It is further supported by the affidavit of the defendant/applicant sworn on even date. The defendant/applicant deposed that the plaintiff/ respondent filed the originating summons dated 24<sup>th</sup> February, 2024 and he filed a statement of defence and counterclaim dated 22<sup>nd</sup> July, 2021. That in both the originating summons and the counterclaim, the parties seek to be recognized respectively as the legal owner of the property known as LR no. 209/10966. Further, he filed a suit before the magistrates court in MCELC no. E209/2021 relating to the ownership of the suit property which is pending before the trial court.
- 4.** The defendant/applicant deposed that the issues in both suits are substantially the same and seek similar relief. He deposed that the plaintiff/respondent has withheld this material fact

from the court, and it is likely that the court will be embarrassed by conflicting decisions in the matter.

5. The plaintiff/respondent filed her replying affidavit sworn on 9<sup>th</sup> April, 2026. She deposed that the application is a deliberate attempt to delay the hearing and determination of this suit. Further, that while she filed a statement of defence and pleaded adverse possession, and on the basis of the court of appeal decision in **Pauline Chemunge Sugawara v Nairuko Ene Mutarakwa and 3 others, (Civil Appeal No. E141 of 2022) (Nairobi) [2024] KECA 1447 (KLR)**, she filed the instant suit before this court. The plaintiff/respondent deposed that the instant suit is not *sub judice* for want of jurisdiction by the magistrates' court. Further, that the trial court delivered a ruling and found it had no jurisdiction thus proceeding to strike out the counterclaim. She averred that a party cannot invoke the doctrine of *sub judice* where a court has found that it has no jurisdiction to hear and determine the issue in dispute like in the present case.

6. The plaintiff/respondent deposed that the instant application has been overtaken by events since the lower court struck out her counterclaim for want of jurisdiction.
7. The application and the preliminary objection were canvassed by way of submissions. The plaintiff/respondent filed her written submissions dated 9<sup>th</sup> April, 2026. The defendant/applicant filed his submissions dated 14<sup>th</sup> April, 2024.
8. I have considered both the application and the preliminary objection. The issue for determination is *whether this suit is sub judice and whether the same should be struck out or dismissed*. I will begin with the notice of preliminary objection. The defendant/ applicant challenged the originating summons dated 24th February, 2024 (sic) on grounds that it offends **Section 6** of the **Civil Procedure Act** to the extent that there is a pending suit filed at the magistrates court in MCELC No. E209 of 2021 between the same parties.
9. In the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR**, it was held that:-

***“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”***

**10.** It is clear that for a preliminary objection to succeed, the same must stem from and not outside of the pleadings. For this court to establish whether this suit is *sub judice*, there is need to check the pleadings contained in the matter filed before the magistrates court. This in my view, would constitute combing through evidence to confirm these facts. Having said that, a preliminary objection is not the best tool to use in the circumstances. Perhaps this is the reason why the defendant/applicant filed a formal application that is also the subject of this ruling. For this reason, it is my finding that the preliminary objection does not raise pure points of law.

**11.** The application before the court seeks to challenge the originating summons filed by the plaintiff/respondent on the

grounds that it is sub judice as stated earlier. **Section 6** of the **Civil Procedure Act** 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.”***

**12. In Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR)**, the Supreme Court of Kenya 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 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. From the above provision of the law and the cited authority, it is necessary to prevent the multiplicity of suits between the same parties, as such processes clog our judicial system creating case backlog. Where it is found that a similar suit has been filed, the court in its endeavor to ensure that there is justice, stay the proceedings in one matter to await the determination of the previously filed suit.
14. In this case, it is not in dispute that there is a pending suit between the same parties over the suit property before the magistrates court in MCELC No. E209 of 2021. The question then is, does the originating summons offend **Section 6** of the **Civil Procedure Act**. The plaintiff/respondent conceded that

she filed a counterclaim in the trial court but the same was dismissed for want of jurisdiction. As a result, she filed this suit claiming ownership of the suit property by virtue of adverse possession.

- 15.** Indeed this court is clothed with original jurisdiction to hear and determine any claims on adverse possession and thus the same is properly before the court. While the cause of action before this court and the trial court are different, the same relate to one property which is the suit property. It appears that the defendant/applicant knowing very well that the trial court was not clothed with the requisite jurisdiction, moved this court vide the said originating summons in a bid to obtain justice. I take note that both parties lay claim over the suit property, and if both suits are allowed to proceed, there is likelihood of conflicting decisions emanating from both courts.
- 16.** The law is that once it is established that there is a similar suit pending before another court, the courts are to stay the latter matter and await finalization of the suit previously filed. Striking out this suit is not the appropriate remedy as argued by the defendant/applicant. I find merit in the notice of motion

dated 11<sup>th</sup> February, 2026 to the extent that the originating summons filed in this matter *sub judice* by virtue of MCELC No. E209 of 2021. Thus, the proceedings in this matter are hereby stayed pending the hearing and determination of the suit before the magistrates' court. The notice of preliminary objection dated 28<sup>th</sup> December, 2025 is hereby dismissed. I make no orders as to costs.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 4<sup>TH</sup> DAY OF MAY, 2026.**

**HON. MBOGO C.G.  
JUDGE  
04/05/2026.**

**In the presence of:**

*Ms. Benson Agunga - Court assistant*

*Mr. J.M. Manyonge holding brief for Mr. Donex Juma for the Defendants/Applicant*

*Mr. Muyove for the Respondent/Applicant*