



**Sergon v Kiprop (Environment and Land Appeal E009 of 2023)  
[2024] KEELC 4 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 4 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

**L WAITHAKA, J  
JANUARY 15, 2024**

**BETWEEN**

**BENJAMIN KIPTUM SERGON ..... APPELLANT**

**AND**

**DICKSON KIPROP ..... RESPONDENT**

**JUDGMENT**

**Background**

1. This Appeal arises from the decision of Hon. Caroline Ateya SRM made on 5<sup>th</sup> May 2023 in Kabarnet MELC No.38 of 2022. Through the impugned ruling, the learned trial magistrate upheld a notice of preliminary objection taken up by the respondent seeking to strike out the appellant's suit with costs on the ground that it is *res sub judice* Iten ELC Case No. E006 of 2022.
2. In upholding the respondent's preliminary objection, the learned trial magistrate *inter alia* stated:-

“I have considered the preliminary objection dated 13/2/2023 that seeks to have this suit dismissed for being *sub judice*, together with the annexed documents. I have also considered the submissions filed by both parties with regard to the preliminary objection and the issues raised therein.

The defendant states that the suit herein is *sub judice* as there is an originating summons being No. E006 of 2022 pending before the ELC Court in Iten. That the defendant herein is the biological brother to Joshua Kiprop the Applicant in the Originating Summons and the defendant herein is his representative. That the Originating Summons was filed on 16.12.2023 while the plaint was filed on 20.12.2022. That the suit therefore contravenes the provisions of section 6 of the Civil Procedure Code and the court has no jurisdiction to entertain this matter.



In opposing the preliminary objection, the plaintiff submits that the claim herein is for damages for trespass and orders of injunction against the defendant from trespassing on the suit land, Baringo/Biboino "B"/427 measuring 2.6 ha. The parties herein are *Benjamin Kiptum Sergon v. Dickson Kiprop*. That the suit before the Iten ELC No. 006 of 2022 the parties are *Joshua Kiprop v. Stephen Cheboi Chepkonga, Sote Chepkonga and Benjamin Kiptum Sergon*. The property is Baringo/Kiboino "B"/427. The claim is for adverse possession over 1.3 ha of the suit land.

They further submit that the court has the jurisdiction to entertain this suit as the parties are different from ELC No.006 of 2022, the prayers sought are different and that the preliminary objection as raised doesn't meet the threshold for a preliminary objection.

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In the suit before court, the subject matter is Baringo/Kiboino "B"/427, which is also the same in the matter pending before the Iten Environment and Land Court. The parties herein are *Benjamin Kiptum Sergon v. Dickson Kiprop* and the claim is for trespass and injunctive orders. In the Iten matter, the parties are *Joshua Kiprop v. Stephen Cheboi Chepkonga, Sote Chepkonga and Benjamin Kiptum Sergon*. The claim is for adverse possession.

The law on *sub judice* only requires the court to consider the subject matter, the parties and that a similar suit is pending before a court with competent jurisdiction. From the above analysis, I find that the subject matter herein is the same as that in the Originating Summons filed before the Iten Environment and Land Court. The parties herein are the same and have or have others under whom they claim litigating in the same title. The reason for this finding is that a determination of the claim in the originating summons will settle the claim between the parties herein and establish the rights of the parties in the present suit, as to ownership.

There is thus no need to have two courts sit and determine ownership rights over the same suit property. Further the Environment and Land Court has unfettered jurisdiction when it comes to determination of land rights and is better placed to make that determination.

I find that the preliminary objection herein is properly before court and falls within what is considered to be a preliminary objection as per the Mukisa Biscuits Case.

Following the provisions of Section 6 of the [Civil Procedure Act](#), I find that the matter before court is *sub judice* the matter pending before Iten Environment and Land Court, OS No. 006 of 2022.

The preliminary objection is upheld and the suit is dismissed with costs to the defendant."

3. Aggrieved by the said determination, the plaintiff (now appellant) appealed to this court on ten (10) grounds that can be reduced to three broad grounds namely: -
  - (i) That the learned trial magistrate erred by upholding the defendant's notice of preliminary objection yet it did not meet the threshold of a preliminary objection;
  - (ii) That the learned trial magistrate erred by considering issues that were neither raised/pleaded nor submitted upon by the respondent;
  - (iii) That the learned trial magistrate erred by failing to consider the plaintiff's (appellant's) submissions.



4. The appellant prays that the Appeal be allowed and an order be made setting aside the subordinate court's decision/order dismissing his suit against the respondent and substituting the same with an order dismissing the respondent's preliminary objection dated 13<sup>th</sup> February 2023 with costs; the appellant's case against the respondent be reinstated and matter be ordered to proceed on its merits and costs of the Appeal.
5. Pursuant to directions given on 17<sup>th</sup> October 2023, that the Appeal shall be disposed off by written submissions, parties filed submissions which I have read and considered.

### **Appellant's Submissions**

6. In his submissions filed on 28<sup>th</sup> November 2023, the appellant submits that the preliminary objection raised by the respondent was unfounded because the cause of action in Kabarnet MELC No.38 of 2022 is trespass to land while the cause of action in Iten ELC No.006 of 2022 is adverse possession; causes of action in the two suits are different. The learned trial magistrate is said to have erred by failing to find that the causes of action in the two suits are different and prayers sought in the two cases different.
7. It submitted that the learned trial magistrate erred by dismissing the suit instead of staying it as ought to happen where the court determines that the case is *sub judice*.
8. It is pointed out that the defendant did not annex any pleadings in Iten ELC No.006 of 2022 and submitted that the learned trial magistrate acted on speculation.
9. The preliminary objection is said to have been based on matters of fact that needed to be ascertained through a deponed affidavit.
10. It is further submitted that the learned trial magistrate erred by considering issues that were neither raised/pleaded nor submitted upon by the respondent like the issue of the respondent being a biological brother of Joshua Kiprop (the applicant in the Iten case), which is a pure matter of fact.
11. Based on decision in the case of *Cyrus Mucebiu Irungu v Martha Wanjiru Irungu & another* (2022) eKLR, where E.C. Cheron J, held that the issue as to whether or not a suit is *res sub judice* is not a pure point of law capable of being considered as a preliminary objection properly raised and does not meet the litmus test of what in law amounts to a preliminary objection, this court is urged to find that the Appeal has merit and allow it as prayed.

### **Respondent's Submissions**

12. In his submissions filed on 7<sup>th</sup> December 2023, the respondent states that it is not in dispute that another matter over the same subject matter had been instituted on 16<sup>th</sup> December 2023, at the High Court being Iten O.S No.E006 of 2022 where the parties are litigating over the same subject matter and submits that the preliminary objection which gave rise to this appeal was properly decided.
13. Maintaining that there are pending proceedings previously instituted over the subject matter, the title in question being the same to wit L.R Baringo/Kiboino 'B'/427, the respondent urges this court to uphold the trial court's decision and dismiss the Appeal with costs to him.



## Analysis and Determination

14. The doctrine of *res sub judice* on which the defendant premised his preliminary objection is provided for in Section 6 of the [Civil Procedure Act](#) which provides as follows:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings 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.”

15. In [Cyrus Mucebiu Irungu v Martha Wanjiru Irungu & another](#) (2022)eKLR, the court held that the issue as to whether or not a suit is *res sub judice* is not a pure point of law capable of being considered as a preliminary objection properly raised and does not meet the litmus test of what in law amounts to a preliminary objection. In that regard see the said case where E.C. Cheron J. stated

“The 1<sup>st</sup> defendant on the other hand alleged that there are two other suits filed earlier than the present suit between the same parties and the subject matter identical. However, copies of pleadings in the other two cases have not been supplied in order for this Honourable Court to interrogate the same to determine whether this suit is *sub judice*. I agree with the submission by counsel for the plaintiff that the issue of *sub judice* does require the ascertaining of facts or probing of evidence in the two earlier suits mentioned by the 1<sup>st</sup> defendant which this honourable court is not privy to. It therefore follows that the issue of *sub judice* is not a pure point of law capable of being considered as a preliminary objection properly raised and does not meet the litmus test of what in law amounts to a preliminary objection.”

The judge cited with approval the case of [Margaret Wachu Karuri v John Waweru Ribiro](#) (2021) eKLR where faced with a similar question, whether *sub judice* can be raised as a preliminary point, the court held as follows:-

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is *sub judice*, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

Consequently, the court finds and holds that the notice of preliminary objection dated 30<sup>th</sup> August 2019, by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/Respondent.”

16. In the circumstances of this case, the defendant did not file a statement of defence. There was contention as to whether or not the issues raised in the suit before the Kabarnet court are the same as those raised in the suit pending at the Iten court. There was also the issue as to whether the parties in the suits were the same. Those issues, unless admitted or acknowledged by the parties in their pleadings, required evidence to prove. As pointed out herein above, the issues were neither admitted nor acknowledged by the parties.



17. In his submissions, the plaintiff acknowledged that Iten ELC Case No.006 of 2022 existed and that it was filed before the suit hereto but contended that the parties are different and causes of action different. He pointed out that the defendant had not annexed any pleadings in Iten ELC Case No. 006 of 2022 thereby leaving the court to speculate on the issues raised in that suit.
18. Upon review of the cases urged by the parties concerning the preliminary objection taken up by the defendant/respondent, I agree with the plaintiff/appellant that the issues raised in the preliminary objection hereto relate to issues of fact which could only be proved through evidence being tendered in court. The submissions by parties, making reference to those pleadings could not make a proper basis of ascertaining the issues of fact presented before court to determine.
19. In any event, where a court finds a suit to be res subjudice unless the court determines that the suit is an abuse of the process of the court, the order that commends itself is an order for stay of the suit pending hearing and determination of the former or an order for consolidation of the suits if sought. In that regard, see the case of *Kinatwa Co-operative Savings & Credit Society Limited v Kinatwa Prestige Ltd* (2021) eKLR where it was stated:-

“It is evidently clear that, the court in Nairobi Chief Magistrate’s Court Civil Case No. E037 of 2021 which suit is between the same parties in this suit, will be required to inter alia determine if the defendants (applicants) action in branding its vehicles, did so with a view to “passing off” and hence gain an advantage of good will developed over time by the Respondent (plaintiff). That issue is exactly the same issue before this court and hence the similarity in the reliefs sought in the two suits. I am not persuaded by the Respondent’s counsel that the suits are distinct and different. They are similar. A determination of either of them, will obviously render the other spent and of no further use. The law requires that in a situation such as this, a subsequent suit is stayed under Section 6 of *Civil Procedure Act* because of the rule of Res *sub judice*” (Emphasis mine).

20. In view of the foregoing, I find the appeal to be merited and allow it as prayed.

**DATED, SIGNED AND DELIVERED THIS 15<sup>TH</sup> DAY OF JANUARY, 2024.**

**HON. L. N. WAITHAKA**

**JUDGE**

In the presence of:

Mr. Kagunza for the Appellant

N/A for the Respondent

Ian - Court Assistant

