



**Olow v Arale & another; Arale (Interested Party) (Environment and Land Case E001 of 2022) [2024] KEELC 946 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 946 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT GARISSA  
ENVIRONMENT AND LAND CASE E001 OF 2022  
JM MUTUNGI, J  
FEBRUARY 28, 2024**

**BETWEEN**

**NUR OLOW FARAH AKA OLOW FARAH AKA DIRIYE MOHAMED  
OLOW ..... PLAINTIFF**

**AND**

**MOHAMED MUDE ARALE ..... 1<sup>ST</sup> DEFENDANT  
MUSLIMA AHMED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**OMAR MUDA ARALE ..... INTERESTED PARTY**

**RULING**

1. The Defendants on 24<sup>th</sup> May 2023 filed a Notice of Preliminary Objection dated 23<sup>rd</sup> May, 2023 on the grounds that:-
  1. The instant suit was Res judicata on account of the same issues raised herein having been directly and substantially in issue in a former suit in Garissa ELC Civil Appeal *No. E002 of 2020* which was finally decided on 26<sup>th</sup> November, 2021.
  2. The suit is subjudice there being a pending appeal at the Court of Appeal *No. E828 of 2022* in which the subject in issue in the instant suit is also directly and substantially in issue therein.
  3. The suit herein is frivolous and an abuse of the Court process.
2. The Court on 27/6/2023 gave directions that the Preliminary Objection be canvassed by way of written submissions. The Defendant/Objectors filed their submissions dated 10<sup>th</sup> July 2023 on 11<sup>th</sup> July 2023 while the Plaintiff/Respondent filed his submissions dated 15<sup>th</sup> September 2023 on 23<sup>rd</sup> September 2023.



3. The Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 established the threshold and criteria of what would merit to be raised as a Preliminary Objection in a suit. In the suit Law, JA stated thus:-

“So far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

4. In the same case Sir Charles Newbold, P. stated as follows:-

“A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of Judicial discretion.”

5. In the present matter and in regard to the Preliminary Objection taken by the Defendants, the issue is whether it satisfies the threshold of what can be raised as a Preliminary Objection. The Preliminary Objection taken by the Defendants is on the grounds that the present suit is resjudicata as well as subjudice. Both “subjudice” and “Resjudicata” are legal concepts codified under Sections 6 and 7 of the *Civil Procedure Act* respectively and if they are successfully invoked by a party they would operate as a bar to the current suit owing to the determination of a previous suit on the same subject matter and similar issues and/or owing to the pendency of an earlier suit on the same subject matter and on the same facts. Section 6 of the *Civil Procedure Act* which deals with the issue of subjudice provides as follows:-

6. Stay of suit

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.

Section 7 that deals with the aspect of resjudicata provides as follows:-

7. Res judicata 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.

6. I am satisfied that the Preliminary Objection taken raises a pure point of law and thereof meets the legal threshold of what can be raised as a Preliminary Objection.

7. In the present matter the issue is whether there has been a previous suit, where the same parties and/or parties claiming through them and/or parties through whom the present parties claim where similar issues or substantially similar issues were raised and determined.



8. The Defendants in their submissions in support of the Preliminary Objection that the suit was subjudice relied on the Supreme Court decision in the Case of *Kenya National Commission on Human Rights v Joseph Rono* (2022) eKLR and *David Ndiu & Others v The AG & Others* among other Cases. The Supreme Court in the Case of *Kenya National Commission on Human Rights v AG & Others*(*supra*) at paragraph 67 of their Ruling stated thus regarding subjudice:-

“(67) The term “subjudice” is defined in *Blacks Law Dictionary* 9<sup>th</sup> Edition as:

“Before the Court or Judge for determination”. The purpose of the subjudice rule is to stop 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 Court 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. The party that seeks to invoke the doctrine of subjudice 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.”

9. In the Case of *Daniel Kipkemoi Bett & Another v Rono* (*supra*) the Court stated as follows:-

“The concept of subjudice is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the relief or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be resjudicata.”

10. In regard to resjudicata doctrine, the Defendant submitted that there was indeed a previous suit *vide* Wajir Magistrates Court Civil Case No. 17 of 2015 between one Mude Arale Farah (deceased) and the Plaintiff herein where the Hon. A. K. Mkoross delivered a Judgment in favour of Mude Arale Farah (deceased) on 27<sup>th</sup> November 2020 regarding the ownership of the same subject matter of the present suit. The decision of the Wajir Magistrates Court was appealed to this Court *vide* Garissa ELC Appeal No. E002 of 2020 by the Plaintiff who was the unsuccessful party before the Magistrate’s Court. The Plaintiff (as Appellant) was the successful party in the appeal and the order by the Magistrate decreeing Mude Arale Farah as the owner of Plot No. R 2264 Wajir was set aside *vide* a Judgment delivered by E. C. Cheronu, J on 26<sup>th</sup> November 2021. On 11<sup>th</sup> November, 2022 the Court of Appeal granted Omar Mude Arale (personal representative of the Estate of Mude Arale Farah) leave to lodge an appeal out of time. The Appeal apparently was lodged at Nairobi Court of Appeal as Civil Appeal No. E 828 of 2022.



11. The suit before the Wajir Magistrate's Court and the Appeal against the decision of the Magistrate's Court to this Court were without doubt between the same parties and involved the same subject matter, being ownership of plot No. R 2664 Bulla Jogoo Wajir. The Plaintiff in the Magistrate's Court Muda Arale Farah (deceased) who was the Respondent in the appeal died after the Judgment in the appeal in this Court was given. The Plaintiff in the instant suit had initially joined him as the 1<sup>st</sup> Defendant while the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant were his son and daughter in law respectively. The Administrator of the estate of Muda Arale Farah (deceased) applied and was joined to the instant suit as an Interested Party to represent the estate of the deceased.
12. On the basis of the foregoing background it is evident that the suit before the Principal Magistrate's Court, the appeal before this Court which was determined and the resultant Civil Appeal *No. E828 of 2022* now pending before the Court of Appeal at Nairobi related to the same parties and the same subject matter. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim under the deceased now represented by the Interested Party in the current proceedings. The Plaintiff and the deceased each laid claim to the suit property. The deceased was adjudged the rightful owner of the property the subject matter of the suit before the Magistrate's Court. This Court reversed that decision on appeal and now there is a second appeal pending before the Court of Appeal. Without any doubt the Court of Appeal will have its say as to who between the Plaintiff and the deceased was the lawful owner of the suit property. Once such decision is made it will bind this Court and the successful party in the appeal upon conclusion of the appeal will execute whatever order is given by that Court.
13. This suit in my view was instituted in abuse of the Court process. The suit had been determined by the Magistrate's Court and on Appeal by this Court. Once an appeal was instituted in the Court of Appeal the matter became subjudice and consequently afresh suit could not properly be instituted on the same subject matter.
14. In the premises I find the Preliminary Objection to be well founded and uphold the same on the ground that the suit is subjudice. The suit cannot be entertained and I dismiss the same with costs to the Defendants.
15. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT GARISSA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024.**

**J. M. MUTUNGI**

**ELC -JUDGE**

