



**Wafula (Suing as Intestate Estate administrator's nominee) &  
another v Wambati & 12 others (Environment & Land Petition  
E002 of 2023) [2024] KEELC 660 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 660 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E002 OF 2023**

**JA MOGENI, J**

**FEBRUARY 15, 2024**

**IN THE MATTER OF HCCC NO. 1145 OF 1987; NAIROBI HCELC NO. 563 OF 2016  
(FORMERLY PETITION NO. 211 OF 2014); BUSIA ELC NO. 59 OF 2018; ACEC CASE  
NO. E026 OF 2020; COACRAPPL NO. E008 OF 2021 AND CRIMINAL APPEAL E018 OF  
2021 (UNDER ARTICLE 50: CLAUSES 4 & 6 AND ARTICLE 22: CLAUSES 1 & 2 (A - C)  
OF THE CONSTITUTION) AND THE ADVOCATES ACT CAP 16: SECTIONS 55 AND  
56) THROUGH THE REGISTERED LAND ACT NO. 6 OF 2012: SECTION 157 (1A - C  
(J-III) & D) AND (THE LAW OF SUCCESSION ACT CAP 160: SECTION 54 OF FIFTH  
SCHEDULE SECTION 14) THROUGH CONSTITUTION RULES 5 (D & E) AND 7 (1 & 2)  
OF 2013 AND ORDER 1: RULE 10 (1 & 2) OF THE CIVIL PROCEDURES ACT CAP 21)**

**BETWEEN**

**BENJAMIN BARASA WAFULA (SUING AS INTESTATE ESTATE  
ADMINISTRATOR'S NOMINEE) ..... 1<sup>ST</sup> DECREE HOLDER**

**AYUB MURUMBA KAKAI (SUING AS THE INTESTATE ESTATE  
ADMINISTRATOR OF THE LATE WILLINGTON WELEKHASIA  
KAKAI) ..... 2<sup>ND</sup> DECREE HOLDER**

**AND**

**JOSEPH WAKOLI WAMBATI & 12 OTHERS & 12 OTHERS & 12 OTHERS & 12  
OTHERS & 12 OTHERS & 12 OTHERS & 12 OTHERS ..... RESPONDENT**

**RULING**

1. This Ruling is in respect to the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents' Notice of Preliminary Objection dated 17/05/2023 which seeks to strike out the entire Petition on the following grounds: -
  1. That the petition, by the Petitioners' own admissions in paragraph 1 of the Petition and in the Notice of Motion dated 9/02/2023 which sought for this petition to be mentioned together



with ELC Petition No. 563 of 2016 (Formerly Petition No. 211 of 2014) that “due to similar matters and same causes of actions between same parties about the same subject matter being compulsory land acquisition through Kenya Gazette Legal Notice No. 1710 of 12/06/1970,” is *sub judice* ELC Petition No. 563 of 2016 (Formerly Petition No. 211 of 2014) and contravenes section 6 of the Civil procedure Act, 2010 and ought to be struck out and/or stayed pending the outcome of ELC Petition No. 563 of 2016 (Formerly Petition No. 211 of 2014);

2. That the Petition herein from its paragraph 2 is appealing against the ruling of Hon. Justice Okong’o delivered in ELC Petition No. 563 of 2016 (Formerly Petition No. 211 of 2014) on 28/06/2021 and as such this Court has no jurisdiction to entertain this appeal camouflaged as constitutional petition against the ruling of the Court of Concurrent jurisdiction;
  3. That the petition herein is vexatious, scandalous, frivolous and an outright abuse of the process of this Honourable Court and ought to be struck out with costs to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents: and
  4. That it is meet and in furtherance of the overriding objectives of Article 159(2) of the Constitution for the timely disposal of proceedings that this Court peremptorily dismiss the petition herein as an abuse of the process of the Court with costs to the Respondents.
2. The Preliminary Objection is not opposed. On 28/11/2023, directions were given on filing of written submissions to the preliminary objection. By the time of writing this Ruling, it is only the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ who had duly submitted and I have considered them. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed written submissions dated 22/11/2023.

### **Analysis and determination**

3. I have considered the considered the preliminary objection as well as the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ written submissions filed in this matter. The issue that suffices for determination is whether the preliminary objection as raised is merited.
4. I have considered the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Preliminary Objection to the effect that the Petition should be struck out for contravening the provisions of Section 6 of the Civil Procedure Act.
5. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 where their Lordships observed thus:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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 a contract giving rise to the suit to refer the dispute to arbitration”. In the same case Sir Charles Newbold, P. stated:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
6. The summation of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Preliminary Objection is that the petition, by the Petitioners’ own admissions in paragraph 1 of the Petition and in the Notice of Motion dated 9/02/2023 which sought for this petition to be mentioned together with ELC Petition No. 563 of



2016 (Formerly Petition No. 211 of 2014) that “due to similar matters and same causes of actions between same parties about the same subject matter being compulsory land acquisition through Kenya Gazette Legal Notice No. 1710 of 12/06/1970,” is *sub judice* ELC Petition No. 563 of 2016 (Formerly Petition No. 211 of 2014) and contravenes section 6 of the *Civil procedure Act*, 2010 and ought to be struck out and/or stayed pending the outcome of ELC Petition No. 563 of 2016 (Formerly Petition No. 211 of 2014).

7. That the subject matter in issue in this petition is the compulsory acquisition of the parcel of land LR No. Ndivisi/Muchi/1265 which is directly and substantially at issue in ELC Petition 563 of 2016 before Lady Justice Anne Omollo between the parties herein. This has been admitted by the Petitioner herein in his pleadings where he pleaded thus “due to similar matters and same causes of actions between same parties about the same subject matter being compulsory land acquisition through Kenya Gazette Legal Notice No. 1710 of 12<sup>th</sup> June, 1970”.
8. To contextualize the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ application on a point of Preliminary Objection, it is necessary to set out the relevant provisions of the *Civil Procedure Act* which they rely on and I set the same out hereunder: -
9. Sections 6 of the *Civil Procedure Act* prohibits a court from hearing a matter that is *sub judice* 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.”
10. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ contend that the concept of *sub judice* which in Latin means “under Judgment” denotes that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent Court to stay the proceeding and such order can be made at any stage.
11. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Counsel submitted that the subject matter of this suit LR. No Ndivisi/muchi/ 1265 is the same subject matter before this Court in ELC 563 of 2016 between the same parties with additional of the judges and advocates who have handled the matter before. It is their submission that this suit being *sub judice* to ELC 563 of 2016, this Court does not have jurisdiction under section 6 of the *Civil Procedure Act*, 2010 to hear and determine it and the petition is for dismissal with costs. That given that the issues raised herein are the same issues raised in ELC Petition 563 of 2016 in this Court between the same parties, this Court, by virtue of section 6 of the *Civil Procedure Act*, 2010 does not have jurisdiction to sustain these proceedings whilst ELC 563 of 2016 which is early in time in terms of filing is also pending and part heard before this Court. The instant suit ought to be stayed and/or dismissed.
12. In *Joel Kenduiywo v District Criminal Investigation of ficer Nandi & 4 Others* (2019) eKLR the Court of Appeal considered the purpose of the said section and held that:

“Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”



13. The conditions precedent for the sub-judice rule to apply were restated by the court in *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR that:
- “...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”
14. In *Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga* (2013) eKLR the Court opined that:
- “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.”
15. I have perused through the record before me and I note that the issue in dispute in the two parallel suits is the issue with regard to the compulsory acquisition of the parcel of land LR No. Ndivisi/Muchi/1265 which is directly and substantially at issue in ELC Petition 563 of 2016. It is indeed evident that Prayer 2 in the Petitioners’ Application dated 9/02/2023 stated as follows:
- “2. Your Hon. My Lady Justice, the two Petitioners herein; pray for their Constitutional Petition No. E002 of 2023 to be mentioned on 15th February, 2023 concurrent with the Environment and Land Case No. 563 of 2016; due to similar matters and same causes of actions between same parties, about same subject matter referred to as Compulsory Land Acquisition through Kenya Gazette Legal Notice No, 1710 of 12th June, 1970.”
16. Further to that, the preamble of the Substantive Petition dated 11/01/2023 on the Court records reads as follows: “Whether, this Hon. Court can be pleased to dispense with this Substantive Petition on priorities before the 15<sup>th</sup> day of February, 2023; so that the same is consolidated or heard concurrently with the Environment and Land Case No. 563 of 2016 on 15<sup>th</sup> February, 2023; due to similar matters about same subject matter and same causes of actions between same parties?2. Whether, the 1<sup>st</sup> Petitioner herein, is aggrieved by the Res Judicator ELC Petition No. 563 of 2014; but, the Trial Judge Hon. Justice Okong’o, knowingly and fraudulently cheats that, the said party could only be enjoined if at all was aggrieved by the Judgment entered on 31<sup>st</sup> July, 1991?”
17. In view of the foregoing, I am inclined to agree with the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ objection on grounds of *sub judice*. I am convinced that out of the Petitioners’ own admission, Environment and Land Case No. 563 of 2016 is directly and substantively in issue with the present Petition. These two suits are similar matters, with the same causes of actions between same parties and both involve the same subject matter. The court will not allow parties to be filing a multiplicity of suits on any basis. *Sub judice* is a principle that go to the core of rule of law as far as litigation is concerned.
18. In view of my finding that this Petition of fends the provisions of Sections 6 of the *Civil Procedure Act*, I am convinced that this is an appropriate case in which to exercise the drastic power of striking out.

### **Disposal orders**

19. The totality of the foregoing is that the cudgels aimed at the head of the Petitioners’ Petition as against the Respondents is inescapable. I find merit in the Preliminary Objection dated 17/05/2023, and



for which reasons the Petition herein is struck out in its entirety with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

Orders accordingly.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> Day of FEBRUARY 2024.**

.....

**MOGENI J**

**JUDGE**

In the virtual presence of :

Mr Obwaka holding brief for Mr Wesonga for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent

None appearance for the Petitioners

None appearance for the 1<sup>st</sup>, 5-12<sup>th</sup> Respondents (Never entered appearance)

Ms. Caroline Sagina : Court Assistant

