



REPUBLIC OF KENYA



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**Sasenyi Multipurpose Co-operative Society Limited v Rukinga Ranching Company Limited
(Civil Appeal E010 of 2022) [2024] KECA 1801 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1801 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E010 OF 2022
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
DECEMBER 20, 2024**

BETWEEN

SASENYI MULTIPURPOSE CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND

RUKINGA RANCHING COMPANY LIMITED RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court of Kenya at Mombasa (Matheka, J.) delivered on 7th December 2021 in ELC Case No. 168 of 2021)

JUDGMENT

1. This is an appeal from the ruling of the Environment and Land Court (ELC) at Mombasa (Matheka, J.) delivered on 7th December 2021 where the trial court struck out the appellant's suit on the ground that it was sub-judice Mombasa ELC Case No. 202 of 2016.
2. A brief background is necessary in order to put this appeal into context. On 8th April 1998, the parties herein entered into an agreement for sale and transfer of leasehold interest of a parcel of land known as LR No. 12263/2 situated west of Mackinnon Road, Tsavo, in Taita Taveta County, measuring about 5,000 acres (hereinafter referred to as "the suit land"), being a subdivision of a ranch that measures 34,398.2 Hectares. The respondent was the vendor while the appellant was the purchaser. The appellant averred in its suit before the trial court, to wit, Mombasa ELC Case No. 168 of 2021, that at all times, it was the respondent's obligation to avail to it (the appellant) a transfer, a lease and certificate of title.
3. A title document was prepared and issued to the appellant, evidencing its ownership of the suit land. However, whereas the respondent held leasehold interest over the suit land, the title given to the appellant erroneously indicated that the interest transferred was freehold. The appellant returned the freehold title to the respondent's advocates and requested them to have the said error corrected so that the certificate of title would reflect transfer of a leasehold interest, but the respondent denied liability.



4. The crux of the appellant's suit was that it was the respondent's obligation to have the certificate of title corrected to reflect the appropriate land tenure. Among the orders sought in the said suit was an order to compel the respondent to issue it (the appellant) with a lease, certificate of title (leasehold) and all other documents required for the purposes of giving it good title to the suit property. The appellant stated in the plaint that there was no other matter pending before the court between the parties apart from ELC Case No. 202 of 2016.
5. The respondent entered appearance under protest and filed a Notice of Preliminary Objection and a Preliminary Statement of Defence, both dated 13th September 2021. In the preliminary objection, the respondent challenged the trial court's jurisdiction to hear and determine the suit on the grounds, inter alia, that there existed similar proceedings between the same parties over the same subject matter which proceedings were alive; that the plaint filed by the appellant was supported by a fatally defective verifying affidavit; that the appellant lacked the requisite authority from her shareholders and/or directors to lodge and maintain the suit; and that the appellant's suit was statute time barred, having being filed more than 23 years from the date the transaction in question took place. In essence, the respondent contended that the trial court lacked jurisdiction to hear and determine the dispute. Among the provisions of the law relied on included sections 5, 7, 12 and 15 of the *Civil Procedure Act*, sections 4 and 7 of the *Limitation of Actions Act*, section 120 of the *Evidence Act*, and sections 18 and 19 of the *Land Registration Act*. The respondent prayed that the plaint be struck out with costs.
6. The trial court, vide a ruling delivered on 7th December 2021, dismissed all the grounds of the preliminary objection, but upheld the ground that the suit was sub-judice Mombasa ELC case No. 202 of 2016 (OS). In the end, the trial court struck out the suit and condemned the appellant to bear the costs thereof.
7. Dissatisfied with the learned judge's decision, the appellant lodged this appeal. In its memorandum of appeal dated 7th February 2022, it faults the learned judge for striking out its suit by relying on section 7 of the *Civil Procedure Act*; failing to analyse and appreciate the circumstances of the other case, thus wrongly concluding that it dealt with the same subject matter as the suit which gave rise to the impugned ruling.
8. When this appeal came up for hearing, learned counsel Mr. Oddiaga appeared for the appellant while the respondent was represented by learned counsel Mr. Ngonze. Both relied on their respective client's written submissions, which they highlighted.
9. Mr. Oddiaga contended that the respondent did not properly satisfy the strict conditions set out under section 7 of the *Civil Procedure Act*. He submitted that the respondent had refused to give a proper title to the appellant despite payment of the full purchase price and that, therefore, the trial court ought to have allowed the dispute between the parties to proceed to full hearing and determination on merit instead of allowing the respondent to run away from its contractual obligations after receiving the purchase price.
10. Counsel submitted that the issues in both suits were different. He stated that Mombasa ELC Case No. 202 of 2016 was filed by the respondent against the appellant and the Chief Land Registrar. In that suit, the respondent was seeking return of a provisional title in respect of the entire undivided land (34,398.2 Hectares) that had been given to the appellant's advocate in the course of the transaction relating to the suit land, the 5,000 acres. Parties recorded a consent whereby the provisional title was returned to the respondent. Counsel further submitted that the plain meaning and understanding of the provisions of section 7 of the *Civil Procedure Act* is that a party shall only be stopped from bringing another suit if at the time of the previous suit the cause of action he now wishes to pursue existed. He cited the decision of this Court in *Moses Mbatia and George Wakaba vs. Joseph Wambura Kihara*



(2021) eKLR where it was held that the gist of section 7 of the Civil Procedure Act is that the former suit must have been heard and finally determined.

11. On his part, counsel for the respondent submitted that Mombasa ELC No. 202 and 2016 (OS) and Mombasa ELC No. 168 of 2021 were filed by the same party (the appellant) against the respondent in respect of the same subject matter and in the same court, the Environment and Land Court at Mombasa; that, in the plaint, it was contended that the appellant referred to ELC No. 202 of 2016 (OS), but did not demonstrate why the claim in ELC No. 168 of 2021 was not incorporated in the earlier suit; and that, therefore, the appellant was guilty of prosecuting its claim in piecemeal and, thus, ELC No. 168 of 2021 was sub-judice ELC No. 202 of 2016 (OS).
12. This being a first appeal arising from a preliminary objection where no evidence was tendered, the Court's mandate is to re-evaluate, re-assess and re-analyze the record of appeal and determine whether the conclusions reached by the learned judge should stand, and give reasons either way. See Abok James Odera t/a A. J. Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates [2013] eKLR, Kiruga vs Kiruga & Another [1988] KLR 348 and Peters vs Sunday Post Ltd [1958] EA 424.
13. Having considered the arguments advanced by counsel, the singular issue for our determination is whether the trial court erred in striking out ELC No. 168 of 2021 on the ground that it was sub-judice ELC No. 202 of 2016 (OS).
14. 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.”

15. The doctrine of sub-judice, also known as the rule of sub-judice, is a fundamental legal principle that prohibits a court from proceeding with a trial or hearing of a matter that is already being considered by another court or Judge. The Supreme Court in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) (Advisory Opinion Reference 1 of 2017) [2020] KESC 54 (KLR) (Constitutional and Human Rights) (7 February 2020) (Ruling) stated thus:

“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.”



16. The doctrine of sub-judice is grounded on the basis that, in the interest of parties and the system of administration of justice, multiple suits between the same parties should be avoided and it serves to protect the integrity of the judicial process and ensures fair and efficient resolution of disputes.
17. Back to this appeal, the crux of the respondent's preliminary objection was that both Mombasa ELC No. 202 of 2016 (OS) and Mombasa ELC No. 168 of 2021 were filed by the same party (the appellant) against the same party (the respondent) in respect of the same subject matter. On its part, the appellant contends that, contrary to the respondent's assertion, Mombasa ELC 202 of 2016 (OS) was never about the 5,000 acres bought from the respondent, but that it was a different suit filed by the respondent for return of the provisional title for the undivided land that had been given to the appellant through its advocate; and that at the time the suit was filed, the appellant was still waiting for the correct title document for the suit land to be availed, having returned the faulty one. He told us that the suit was eventually compromised and the provisional title returned to the respondent.
18. We have perused the record of appeal. Save for the pleadings filed in respect of ELC No. 168 of 2021, there are no pleadings in respect of ELC Case No. 202 of 2016 (OS). Therefore, we did not have the benefit of going through the pleadings in ELC No. 202 of 2016 (OS) to establish the cause of action as well as the prayers and/or the orders sought therein. However, at page 53 of the record of appeal, the respondent's submissions reveal that the OS was headed: Rukinga Ranching Company Limited Vs Sasenyi Multipurpose Co-operative Society Limited & Another. That implies that the suit was filed by the respondent against the appellant and another party, most likely the Chief Land Registrar, as submitted by the appellant's counsel.
19. In the impugned short ruling, the learned Judge states:

“I have perused the pleadings referred to in the preliminary objection, that is Mombasa Environment and Land Case Number 202 of 2016 and note that it is between the same parties and the same subject matter. The Chief Land Registrar is the second defendant in that matter. This also is not in dispute instead the Plaintiff submits that the Defendant cannot use a suit instituted for other reasons to now avoid fulfilling its rightful obligation in the contract. They are estopped from running away from their obligation. I find this suit an abuse of the court process and is sub judice Mombasa Environment and Land Case Number 202 of 2016. I find this preliminary objection on this issue merited and I strike out the suit with costs to the Defendant.”
20. In our view, the nature of the preliminary objection raised by the respondent was not as defined in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. A preliminary objection must consist of a pure point of law which has been pleaded and which, if argued as a preliminary issue, may dispose of the suit, and such an objection cannot be raised if any fact in its proof has to be ascertained by adduction of any form of evidence. Evidence was required to prove what the claim was all about in ELC Case No. 202 of 2016, and whether it was heard and determined on its merit or settled by consent as alleged by the appellant's counsel.
21. It also appears to us that the two suits were different, and that the parties were not entirely the same. It is not in dispute that the Chief Land Registrar was not a party to the suit before the trial court. Although the learned Judge said that she had perused the pleadings relating to the OS, the record of appeal before us does not contain the same. Therefore, we are not able to determine what the respondent was seeking.
22. In the circumstances, we do not think that the preliminary objection was well taken. All in all, we are satisfied that this appeal is meritorious. We allow the appeal, set aside the trial court's ruling and



substitute therefor an order that ELC Case No.168 of 2021 be reinstated for hearing before any judge of the ELC other than Matheka, J. The respondent shall bear the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

