



**Ware Transport Limited v Third Engineering Bureau of China City Construction Group Co Ltd; Tiba Freight Forwarders Limited (Third party) (Environment & Land Case 252 of 2021) [2024] KEELC 1550 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1550 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 252 OF 2021**

**LL NAIKUNI, J  
MARCH 7, 2024**

**BETWEEN**

**WARE TRANSPORT LIMITED ..... PLAINTIFF**

**AND**

**THE THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION GROUP CO LTD ..... DEFENDANT**

**AND**

**TIBA FREIGHT FORWARDERS LIMITED ..... THIRD PARTY**

**RULING**

**I. Introduction**

1. Before this Honourable Court for determination is the Preliminary Objection raised by the Third Engineering Bureau of China City Construction Group Co. Limited, the Defendant herein, dated 28<sup>th</sup> September, 2023 in response to the suit filed by the Plaintiff via the Plaint dated 21<sup>st</sup> December 2021.

**II. The Objection by the Defendant**

2. The 2 paragraphed Notice of Preliminary Objection by the Defendant raised the following objections:-
  - a. This the Plaintiff's claim against the Defendant herein is "Sub - Judice" under Section 6 of the Civil Procedure Act, as the matter in issue being the alleged trespass by the Defendant over the suit property being Land Reference Number MN/V/2407 is also directly and substantially in issue in a suit previously instituted by the Plaintiff against the Third party herein, being Mombasa ELC 64 of 2013: WARE Transport Limited v Tiba Freight



Forwarders Limited and 4 others, which matter is pending before this Honorable Court.

- b. The area allegedly encroached by the Defendant in the instant suit is identical to that allegedly encroached by the 3<sup>rd</sup> party herein who is the 5<sup>th</sup> Defendant in Mombasa ELC 64 of 2013: WARE Transport Limited v Tiba Freight Forwarders Limited and 4 others, as is attached in the Plaintiff's bundle of documents in both suits. The Plaintiff's suit against the Defendant is therefore frivolous, vexatious and an abuse of the process of this Honorable Court and should be dismissed with costs..

3. Consequence of which the Defendant sought for the suit to be dismissed with costs.

### III. Submissions

4. On 2<sup>nd</sup> October, 2023 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 28<sup>th</sup> September, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 17<sup>th</sup> January, 2024 a ruling date was reserved for 5<sup>th</sup> March, 2024 by the Honourable Court accordingly. Subsequently, the delivery of the Ruling was deferred to 7<sup>th</sup> March, 2024 thereof.

#### A. The Written Submissions by the Defendant/Objector

5. The Defendant/ Applicant through the Law firm of Messrs. Omusolo Mungai & Co Advocates filed their written submissions dated 10<sup>th</sup> January, 2024. M/s. Mwendwa Advocate commenced their submissions by stating that the Defendant herein filed a Preliminary Objection anchored on the principle of "Res sub Judice" as provided under the provision of Section 6 of the *Civil Procedure Act*, Cap 21. The Learned Counsel submitted that the matter in issue in the subject suit, was substantially in issue in Civil Case of "ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. The area allegedly encroached upon as pleaded by the Plaintiff, is identical to that which the Third Party herein who is the 5<sup>th</sup> Defendant in the said Civil Case of ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. is alleged to have encroached upon. Both ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others and Mombasa ELC 252 of 2021, were mentioned in court on 2<sup>nd</sup> October 2023, wherein directions on filing of the instant submissions, were issued.
6. According to the Learned Counsel, the summary of claim in the Civil Case of "ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others is sued as the 5<sup>th</sup> Defendant. The Plaintiff's claim against Tiba Freight Forwarders Limited is pleaded as follows:
  - a) At all material times to the suit, the Plaintiff has been and still is the registered proprietor and entitled to possession of the property known as LR No.MN/N/2407, situate in Kibarani Mombasa (herein referred to as the suit property).
  - b) At all material times to the suit... the 5<sup>th</sup> Defendant is the registered proprietor of LR No. MN/N/1902
  - c) The Plaintiff states that towards the end of the year 2012, the Defendants by themselves, their agents and/or servants wrongfully entered into the portions of the suit property and in the process carried out excavation and put-up structures which have encroached on the suit property.



- d) By virtue of the Defendants trespass and wrongful occupation of portions of the suit property, the Defendants have misused, damaged, wasted, destroyed and/or degraded the suit property by reason of which the Plaintiff has been deprived of the use and enjoyment of the suit property,
  - e) The Plaintiff then raises particulars of trespass as well as particulars of loss and damage
  - f) The Plaintiff further seeks the following reliefs:
    - i) A declaration that that the plaintiff is entitled to exclusive and unimpeded right of possession and use of the suit property.
    - ii) A declaration that that the Defendants whether by themselves or their servants or agents or otherwise are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
    - iii) A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise from remaining on or continuing in occupation of or carrying out activities on the suit property.
    - iv) Vacant possession of the portion of LR No. MNN/2407 trespassed on by the defendants.
    - v) General damages for trespass.
    - vi) Costs of the suit.
7. On the summary of the claim in “ELC 252 (Mombasa) of 2021: Ware Transport Limited v The Third Engineering Bureau Of China City Construction Group Company Limited and Tiba Freight Forwarders Limited (Third Party), the Learned Counsel submitted that the Plaintiff filed suit against the Defendant being Mombasa ELC 252 of 2021: Ware Transporters Limited v The Third Engineering Bureau of China City Construction Group Company Limited, which suit was instituted via a Plaint dated 21<sup>st</sup> December 2021 and filed on 11<sup>th</sup> January 2022. The Plaintiff averred to be the registered proprietor of the property LR No. MN/V/2407 measuring approximately 3.829 Hectares, situate within Kibarani, Mombasa County. The Plaintiff stated that it noticed that the Defendant was operating from the suit property, the same having been leased out by a 3<sup>rd</sup> party. The Defendant entered appearance and thereafter filed a motion to enjoin the third party herein - Tiba Freight Forwarders Limited-, who had leased out its property LR.No.MN/V/1902 to the Defendant and which property is adjacent to the suit property (a fact that is pleaded in ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. The third-party application was allowed, with Tiba Freight Forwarders Limited being joined into the instant suit.The Plaintiffs claim in the subject suit against the Defendant, is anchored on the tort of Trespass, for which the Plaintiff seeks damages.
8. On the law applicable, the Learned Counsel submitted that “Res Sub – Judice” denotes that a matter is being considered by a court or Judge. The concept of sub judice that where an issue was 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 was passed by the subsequent court to stay the proceeding and such order can be made at any stage. he mere addition of a party or parties does not alter the pith and substance of the suit. (See “Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR”.



9. The Supreme Court of Kenya in the case of:- “Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)” had occasion to pronounce itself on the subject of “Sub - Judice”. It aptly stated: -

“(67) 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.”

10. Like other maxims of law, the Sub - Judice rule has a salutary purpose. The basic purpose and the underlying object of Sub - Judice was to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This was to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.
11. The Learned Counsel held that the doctrine of Sub - Judice would apply only if there was identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings was identical. Paraphrasing what I said in the above case, the key words in applying Sub - Judice rule was that “the matter in issue is directly and substantially in issue in the previously instituted suit.” The test for applicability of the Sub - Judice rule was whether on a final decision being reached in the previously instituted suit, such decision would operate as “Res – Judicata” in the subsequent suit. However, when the matter in controversy is the same, it is immaterial what further relief was claimed in the subsequent suit or suits.
12. The Learned Counsel argued that as the High Court of Uganda held in the case of:- “Nyanza Garage v Attorney General, HCCS No.450 of 1993”:
- “In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”
13. The uncompromising manner in which courts have consistently enforced the Sub - Judice rule was best explained in “Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga,[2013] eKLR” which held that it was not the form in which the suit is framed that determines whether it was Sub - Judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard



parallel to each other. In determining whether or not Sub - Judice applied, it was the substance of the claim that ought to be looked at rather than the prayers sought. (See “Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya”, supra.)

14. On the analysis of the law against the facts, the Learned Counsel submitted that in light of the foregoing, the legal highlights were as follows:-
  - a. The existence of two pending suits filed by the Plaintiff, is not disputed.
  - b. The Plaintiff expressly admits that the Defendant herein, occupied (allegedly)the suit property pursuant to a lease.
  - c. The Defendant has filed documentary evidence in support of the fact that it executed a lease between itself and the third party.
  - d. The Third party expressly confirms the lease to the Defendant.
  - e. Both pending suits filed by the Plaintiff, are admittedly anchored on the tort of trespass, for which the Plaintiff seeks damages.
15. What then was the consequence of sustaining both suits? The Learned Counsel acquiesced thus as follows:
  - a. Should both suits be sustained, there was a great risk of there being two conflicting decisions over the Plaintiff's claim.
  - b. Should the court find in favour of the Plaintiff in both matters, the latter would benefit from unjust enrichment having received double compensation over the same subject matter.
16. In conclusion, the Learned Counsel, therefore, submitted that the preliminary objection raised herein was merited and ought to be allowed, with ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. which suit was admittedly filed first in time, being heard and determined first. It further could not escape the mind of this Honourable court that the decision in the Civil Case “ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others would directly impact the outcome of the suit in the Civil case of “ELC (Mombasa) 252 of 2021: Ware Transporters Limited v The Third Engineering Bureau of China City Construction Group Company Limited and Tiba Freight Forwarders Limited.

## **B. The Written Submission by the Plaintiff/Respondents**

17. The Plaintiff/ Respondent through the Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Co. Advocates filed their written submissions dated 3<sup>rd</sup> November, 2023. Mr. Munyithya Advocate commenced by stating that this were the Plaintiff's submissions to the preliminary objection dated 28<sup>th</sup> September, 2023 as filed by the Defendant. The Defendant's Preliminary Objection was through reliance on the provision of Section 6 of the Civil Procedure Act, Cap 21 on stay of suit which was commonly referred as the doctrine of sub-judice.
18. The Court would note that the Plaintiff brought this suit against the Defendant vide a Plaint dated 21<sup>st</sup> December 2021 filed in Court on 11<sup>th</sup> January 2022. The Plaintiff's prayers were strictly against the Defendant herein. The third party joined this suit as a result of third-party notice served by the defendant to the third party.
19. The Learned Counsel submitted that the Preliminary Objection raised by the Defendant never satisfied the requirements for stay of suit under the provision of Section 6 of the Civil Procedure Act,



Cap.21. They relied on the advisory decision of the Supreme Court of Kenya in the case of:- “Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR” where the Court stated:-

“67. ...The purpose of 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-----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 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.”

20. The Supreme Court was clear that for the doctrine of sub-judice to suffice, the party raising the Preliminary Objection must clearly show that there is a similar subject matter to the referred case. In the instant suit, reference is made to ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. The objecting party must also demonstrate that the parties were the same in the instant suit and the referred case. The Learned Counsel submitted that the Plaintiff's case was against the Defendant herein whom he sought to have Judgment delivered against. The Defendant herein was not a party to the referred case, ELC No.64 of 2013. It was a strict rule that the two referred cases need to have the same parties. In the case of: ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. ELC No. 64 of 2013, the defendant, the Third Engineering Bureau of China City Construction Group Company Limited was not a party.
21. Turning to what constituted a preliminary objection, the Learned Counsel referred to the case of:- “Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696”, where it was held that:

“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 the contract giving rise to the suit to refer the dispute to arbitration... 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.”

22. The issue raised as ground one in the notice of preliminary objection dated 28<sup>th</sup> September 2023 is a disputed fact. It is clear that a preliminary objection cannot be raised on a disputed fact. The Court in “Margaret Wachu Karuri v John Waweru Ribiro [2021] eKLR”, the Court was faced with a similar question whether Sub - Judice could be raised as a preliminary point and 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.”

23. It followed that in the notice of Preliminary Objection raised by the Defendant in the instant suit never raised a pure point of law. Therefore, it could not be considered as a Preliminary Objection properly raised. To buttress on this point, the Learned Counsel wished to rely on the case of “Mohan Galot v Walter Omosa Nyakundi & 21 others; Pravin Galot & 2 others (Interested Parties) [2020] eKLR” where the Court held that;

“For the Court to determine whether the issues herein were directly and substantially in issue with the others suit, the Court will have to ascertain facts and probe evidence. Further the issue 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 that the issue of sub judice as raised by the Defendants/ Respondents does not amount to a Preliminary Objection, and does not qualify to be determined as Preliminary Objection.”

24. The Learned Counsel submitted that the preliminary objection, as raised by the Defendant claiming this matter was Sub - Judice was improper. It was the considered view of several courts that a preliminary objection could not be raised on disputed facts. The Defendant on ground one of the notice of preliminary objection chose to rely on a disputed fact thus rendering its objection unmerited. Further, the Defendant claimed there were same parties to the reference case ELC No. 64 of 2013. It was however necessary for this Court to note that the Defendant herein was not a party in ELC No. 64 of 2013. The issue of same parties could not be relied on by the Defendant knowing quite well that it was not a party to the case it sought to rely upon.
25. In conclusion, the Learned Counsel submitted that to this end, the preliminary objection raised by the Defendant was unmerited and should be dismissed.

#### **IV. Analysis and Determination**

26. I have considered the Notice of Preliminary Objection dated 28<sup>th</sup> September, 2023 raised by the Defendant and the rival submissions, the myriad of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
27. For purposes of arriving at an informed, just, fair and reasonable decision, the Honourable Court crafted three (3) issues fall for determination in the Notice of Preliminary Objection. These were: -
- a. Whether the objection through the Preliminary Objection dated 28<sup>th</sup> September, 2023 raised by the Defendant meets the threshold of an objection based on Law and precedents.
  - b. Whether the present suit before this Honourable Court is Res sub judice.
  - c. Who bears the costs of the Notice of Preliminary objection dated 28<sup>th</sup> September, 2023.



**IssueNo a). Whether the objection through the Preliminary Objection dated 28<sup>th</sup> September, 2023 raised by the Defendant meets the threshold of an objection based on Law and precedents.**

28. Under this Sub heading, the main substrata here is an Preliminary objection raised by the Defendant. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
29. The provision of Order 2 Rule 9 of the Civil Procedure Rules, 2010 provides;
- “ A party may by his pleading raise any point of law.”
30. According to the Black Law Dictionary a Preliminary Objection is defined as being;
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
31. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits v Westend Distributor Ltd [1969] EA 696”, the court observed that: -
- “ 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. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”
32. The same position was held in the case of “Nitin Properties Ltd v Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
- “ A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
33. Similarly in the case of “United Insurance Company LTD v Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005[2005] LLR 7396”, the Court held that;
- “ A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
34. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;
- “ A Preliminary Objection cannot be raised if any facts has to be ascertained.”
35. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Defendant herein. Therefore at this stage, this Court is expected to consider legal issue(s) that go to the root of whether there is a



competent suit before Court and/or whether the Court has/lacks jurisdiction to hear and determine such matter.

#### **Issue No b). Whether the present suit before this Honourable Court is Res Sub Judice**

36. Under this Sub heading, the Honourable Court now wishes to apply the able legal principles, the provision of Section 6 of the [Civil Procedure Act](#) provides:-

“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.”

37. In the case of:- “Republic v Registrar of Societies - Kenya & 2 Other Ex-Parte Moses Kirima & 2 Others [2017] eKLR” the court held 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 pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

38. The rationale for this principle was restated in the case of:- “Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage v Attorney General” in which the Court held that:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

39. Further in the case of:- “Barclays Bank of Kenya Limited v Elizabeth Agidza & 2 Others [2012]eKLR” the court held that:

“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the [Civil Procedure Act](#), Section 6 will still apply. This is so because the overriding objective of the [Civil Procedure Act](#) is for expeditious and proportionate resolution of civil disputes between parties...”

40. Additionally, in the case of:- “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.”



41. However in “Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR” the Court opined itself that:-

“...In this case whereas it may be true that the issues in both suits may not be directly and substantially in issue, it is however clear that no matter how one looks at the dispute, the resolution thereof will ultimately depend on the determination of the question of the leadership of the Africa Independent Pentecostal Church of Africa. Even if this Court was to find that the cancellation of the subject agreement and the reconciliation by the Registrar was improper, the issue as to the leadership of the Church would still remain at large pending the determination of the other suit, assuming this suit would be determined earlier. On the other hand if that other suit were to be determined before these proceedings, the setting aside of the decision of the Registrar subsequent to the determination of the leadership of the Church would only cause confusion and chaos in a matter which is already riddled with a plethora of litigation...”

42. The import of the concept is that as soon as the Court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in “Kenya National Commission on Human Rights v Attorney General”; “Independent Electoral & Boundaries Commission & 16 others (Interested Parties)” as cited by the Defendant in its submissions.

43. I have had the pleasure to go through “ELC (Mombasa) 64 OF 2013: Ware Transport Limited v Tiba Freight Forwarders Limited’ is sued as the 5<sup>th</sup> Defendant. The Plaintiff’s claim against Tiba Freight Forwarders Limited is pleaded as follows:

- a) At all material times to the suit, the Plaintiff has been and still is the registered proprietor and entitled to possession of the property known as LR No.MN/N/2407, situate in Kibarani Mombasa (herein referred to as the suit property).
- b) At all material times to the suit... the 5<sup>th</sup> Defendant is the registered proprietor of LR No.MN/N/1902
- c) The Plaintiff states that towards the end of the year 2012, the Defendants by themselves, their agents and/or servants wrongfully entered into the portions of the suit property and in the process carried out excavation and put-up structures which have encroached on the suit property.
- d) By virtue of the Defendants trespass and wrongful occupation of portions of the suit property, the Defendants have misused, damaged, wasted, destroyed and/or degraded the suit property by reason of which the Plaintiff has been deprived of the use and enjoyment of the suit property,
- e) The Plaintiff then raises particulars of trespass as well as particulars of loss and damage
- f) The Plaintiff further seeks the following reliefs:
  - i) A declaration that that the plaintiff is entitled to exclusive and unimpeded right of possession and use of the suit property.
  - ii) A declaration that that the Defendants whether by themselves or their servants or agents or otherwise are wrongfully in occupation of the suit property and are accordingly trespassers on the same.



- iii) A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise from remaining on or continuing in occupation of or carrying out activities on the suit property.
- iv) Vacant possession of the portion of LR No. MNN/2407 trespassed on by the defendants.
- v) General damages for trespass.
- vi) Costs of the suit.

44. In the said Suit the Plaintiff in this instant suit pleaded at paragraph 4 that:-

“ At all material times to the suit, the Plaintiff has been and still is the registered proprietor and entitled to possession of the property known as L.R. No. MN/V/2407 situate in Kibarani Mombasa (Hereinafter referred to as the suit property).

45. In this instant suit under paragraph 3 of the Plaint dated 21<sup>st</sup> December, 2021, the Plaintiff who is still the same Plaintiff in Mombasa ELC 64 of 2013 averred that:-

“ At all material times to this suit the Plaintiff was the registered proprietor of all that plot known as Land Reference Number MN/V/2407 measuring approximately 3.829 Hectares and which land is situate within Kibarani area of Mombasa County. For purposes of this suit this property is referred to as the “The Entire Property”.

46. In the prayers in the instant case, at prayer (d), the Plaintiff seeks for an order of mandatory injunction compelling the Defendant by itself, agents and/or assigns to vacate and leave and dismantle all the improvements erected on Plot No. MN/V/2407 and remove all the debris thereof which prayer is similar to (iv) in ELC (Mombasa) 64 of 2013: Ware Transport Limited v Tiba Freight Forwarders Limited and 4 others. Mombasa ELC 64 of 2013.

47. Notably, land is an emotive resource in Kenya. The complexity about the intertwining weavings and intersections between its ownership and the attachment many a person in Kenya give it so much so that it brings out the intensity of emotions attendant to it can only be discerned from the length of time some cases take and the energy and zeal they often take from both the litigant and learned counsel as well as judicial officers. Different scenarios present themselves to courts when they handle matters on land which draw long and protracted litigation.

48. To avoid a situation such as the one described above, Parliament in its wisdom enacted the provisions to cater for cases where overzealous parties might run to and fro in the corridors of justice so as to mine for the best result in their estimation. In that regard, Section 5 of the *Civil Procedure Act* lays the basis for the operation of Section 6 of the *Civil Procedure Act* by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For this reason, this court having found that it is barred by the operation of law and in particular, Section 6 of the *Civil Procedure Act*, it lacks the requisite authority to hear and determine this suit.

49. The upshot is that the preliminary objection is merited and is hereby allowed. The suit before this Honourable Court is hereby stayed pending the determination of Mombasa “ELC 64 of 2013: WARE Transporters Limited v Tiba Freight Forwarders Limited and 4 others”.



**IssueNo. c). Who bears the costs of the Notice of Preliminary objection dated 28<sup>th</sup> September, 2023**

50. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

51. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

52. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18<sup>th</sup> Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

53. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2<sup>nd</sup> Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

54. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – v Evrest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

55. In this case, as this Honourable Court has opined above, the Defendant/Applicant has convinced this Honourable Court that the suit is Sub - Judice under the provision of Section 6 of the Civil Procedure



Act, Cap. 21 as per the Notice of Preliminary objection dated 28<sup>th</sup> September, 2023 to be paid by the Plaintiff whatsoever.

#### **V. Conclusion and Disposition.**

56. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders:-
- a. That the Preliminary objection dated 28th September, 2023 is found to have merit and is hereby sustained.
  - b. That the suit instituted brought by the Plaintiff through the Plaint dated 21st December, 2021 against the Defendant be and is hereby found to offend the Doctrine of “Res Sub Judice” and hence stayed pending the hearing and final determination of the civil case “ELC 64 OF 2013: WARE Transport Limited v Tiba Freight Forwarders Limited and 4 others pursuant to the provision of Section 6 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya.
  - c. That costs of the Preliminary objection dated 28th September, 2023 by the Defendant to be borne by the Plaintiff herein.

It Is So Ordered Accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF MARCH 2024.**

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**HON. JUSTICE L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant;**
- b. M/s. Umara Advocate for the Plaintiff/Respondent**
- c.M/s. Mwendwa Advocate for the Defendant/Applicant.**
- d. No appearance for the Third Party**

