



Waro (Suing as the Legal Representative and Administrator of the Estate of Mumba Chome Waro - Deceased) v Juba & 3 others (Environment & Land Case 49 of 2023) [2024] KEELC 4411 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 49 OF 2023**

**EK MAKORI, J
MAY 23, 2024**

BETWEEN

NYEVU MUMBA WARO (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF MUMBA CHOME WARO - DECEASED) PLAINTIFF

AND

**JERRYSON TAURA JUBA 1ST DEFENDANT
RAFIKI MICROFINANCE BANK 2ND DEFENDANT
TROPHY AUCTIONEERS 3RD DEFENDANT
LAND REGISTRAR, KILIFI 4TH DEFENDANT**

RULING

1. The plaintiff/applicant made an application under a certificate of urgency in this matter dated 14th December 2023, significantly seeking injunctive orders to restrain the defendant /respondents from selling, advertising for the sale, and disposing of all that land known as Kilifi/Roka/794 pending the hearing and determination of the application in the first instance and subsequently the main suit with the attendant costs.
2. As the duty judge, I presided over the matter and marked it urgent. However, I refrained from issuing any interim orders. Instead, I directed the applicant to serve the motion for an inter partes hearing on 19th December 2023.
3. On 19th December 2023, when the parties appeared before me, Ms. Wanja, learned counsel for the 2nd defendant/respondent, intimated to this Court that the issues raised in the application had a bearing with a matter pending before the Magistrates Court at Kilifi, that is Kilifi MELC No. 49 of



- 2020 involving the same subject matter and that the trial Court had declined to issue an injunction restraining the 2nd and 3rd respondents from advertising for sale and selling the said suit property in the exercise of the 2nd respondent's Statutory Power of sale since the property had been charged as security by third parties (not sued here or at Kilifi Magistrates Court) to secure a loan, which they had defaulted and that the 1st respondent who was the registered owner had consented to it being placed as collateral.
4. In declining to issue a temporary injunction, the Court directed that the parties first deal with the Kilifi matter to avoid a proliferation of suits and running afoul of the doctrine of sub judice. This was also informed by the fact that it is not prudent for two Courts of competent jurisdiction to be seized with similar matters. It may lead to incongruent decisions and ultimate orders emanating therefrom and place the rule of law in disrepute.
 5. The applicant could not hear any of it. Another application was filed on the 20th day of December 2023, this time not only seeking a temporary injunction but also seeking that the Court review its earlier orders of declining to issue a temporary injunction because the property was in imminent danger of sale, which was due the following day. The reason(s) proffered was that the property that was the subject matter in the Kilifi Magistrates Court was parcel No.Kilifi/Oyombo/794 and not parcel No. Kilifi/Roka/794. That counsel for the 2nd respondent had misguided the Court on the subject matter in the Kilifi Court. Since the sale was due the following day, the Court was inclined to issue a temporary injunction ex parte to avoid an injustice if it turned out that the parcel of land due for sale was different. This Court is usually unenthusiastic in issuing ex parte orders without hearing parties inter partes, as practice has shown that the issuance of unwarranted ex parte orders tends to slow the progression of a case and lead to abuse of the Court process.
 6. When the parties appeared before me for an inter partes hearing, the Court directed them to file responses and written submissions. They complied.
 7. The Court has reviewed the materials, averments for and against the motions, and preliminary opposition raised by the opposing side, particularly the 2nd respondent on the jurisdiction of this by dint of the doctrine of res judicata. I have also reviewed the parties' submissions and the cited authorities. The issues I frame for the decision of this Court are whether this Court should review its earlier orders of declining to issue an ex parte injunction, whether to issue a temporary injunction pending the hearing and determination of the main suit, and who should bear the costs of the motions filed herein.
 8. I already issued an ex parte injunction on 20th December 2023, restraining the respondents from selling the suit property pending the inter parte hearing of the pending motions subject to the current ruling. There is nothing to review. The two motions are the same. What remains to determine is whether, from the materials and submissions presented before me, a temporary injunction should be issued pending the hearing and determination of the main suit.
 9. On this issue, Mr. Lewa extensively provided the history of the ownership and registration of the suit property, Kilifi/Roka/ 794, which he said is not similar to Kilifi/Oyombo/794. The plaintiff is the administrator and sole beneficiary of her deceased husband's estate - Mumba Chome Waro, who was the first registered proprietor of all the parcel of land known as Kilifi/Roka/794. On the 8th of August 2013, the 1st defendant acquired title to the suit parcel of land through fraudulent transmission and misrepresentation by dint of a grant of letters of administration issued to him in Kilifi MCSUCC. No. 79 of 2009 - In the matter of the estate of Mumba Chome Waro (deceased). That is pursuant to the plaintiff's application by way of Summons for Revocation of the grant of letters of administration made to the 1st defendant in Kilifi MCSUCC. No. 79 of 2009 - In the matter of the estate of Mumba Chome Waro(deceased), the grant was revoked. That by dint of a Charge dated 28th



November 2013, registered over the 1st defendant's illegal title deed to the suit parcel of land, the 2nd defendant, purporting to exercise its Statutory right of Sale, did advertise the suit parcel of land for sale by public auction which was scheduled for 21st day of December 2023. It is against the preceding background that the plaintiff herein filed this suit vide a plaint dated 14th December 2023, in which, she is seeking, amongst other prayers, an order compelling the Land Registrar, Kilifi, who is sued as the 4th defendant in the suit herein, to cancel and revoke the 1st defendant's title deed to the suit parcel of land and restore it to the status quo obtaining before the 8th August 2013, when it was registered in the 1st defendant's name by way of transmission fraudulently.

10. Mr. Lewa cites authorities that this Court needs to consider when issuing a temporary injunction. These cases include the celebrated *Giella v Cassman Brown & Co. Ltd* [1973] E.A. 358, which sets out the conditions for the issuance of an injunction generally, and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, which expounds the ambit of a prima facie case.
11. He concludes that since the grant of letters of administration was revoked, the title that the 1st respondent offered to be placed as collateral was fraudulently obtained. Hence, any dealing after that is treated as illegal. He cites the decision in *McFoy v United Africa Company Limited* [1961] 3 ALL ER 1169, where the court held as follows:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for the court to set an order aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12. He further cites the decisions in *Sambayan Ole Semera v Kalka Flowers Limited & another* [2021] eKLR, a landmark case regarding the unenforceability of charges resulting from a fraudulent scheme. He states that since the title subject to this action was fraudulently placed as a charge if sold before the applicant is heard, the applicant will suffer an irreparable loss that damages cannot compensate. He quotes the decision in *Said Almed v Mannasseh Benga & another* [2019] eKLR, a pivotal case that sets a precedent for similar situations.
13. Mr. Lewa concludes that the balance of convenience tilts in favour of the applicant and that an injunction should be issued to preserve the suit's substratum until the current suit is heard and determined – see *Peter Kimani Nene v Kenya Commercial Bank Limited* [2016] eKLR where the Court of Appeal held that:

“The balance of convenience is in favour of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognised in law and should not be allowed to proceed on doubtful circumstances.”

14. The 1st respondent, through affidavit, avers that he is the rightful owner of the suit property. He acquired it through transmission. He had filed a Succession Cause. He obtained a grant, which was later revoked. He said he did not consent to the land being placed as security. Some 3rd parties who took a loan from the 2nd respondent had conned him through their trickery to have the land placed as collateral.
15. Ms. Wanja, for the 2nd respondent, submits that because there is already an existing ruling denying injunctive orders being sought here and upholding the 2nd defendant/respondent's right to recovery, the issue before this court is res judicata. Thus, to avoid embarrassing the judicial system, this Court



cannot issue other similar orders over the same subject matter unless in the exercise of its appellate jurisdiction, which has not been invoked. The 2nd respondent contends, therefore, that this Court lacks jurisdiction, which issue has to be addressed in limine.

16. The 2nd respondent asked why the applicant could not apply to join the suit Kilifi MELC No. 49 of 2020 so that all matters about the suit property could be decided in that suit at once. In the circumstances, the 2nd respondent believes the applicant is engaged in forum shopping to prolong the conclusion of the matter, which is a clear waste of precious judicial time and resources.
17. 2nd respondent believes that this Court has no jurisdiction to issue the orders sought because the pending Kilifi matter declined to issue an injunction. The decision by that Court has not been challenged on appeal. The 2nd respondent believes the current application is res judicata, having been raised and dismissed in Kilifi MELC No. 49 of 2020. In that regard, the 2nd respondent has cited the English case of Henderson v Henderson [1843-60] All ER 378, where the Court observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
18. In view of the preceding and the holding in Owner of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited, the Court is urged to down tools.
19. On the merits of the application, the 2nd respondent avers that the applicant has not met the Giella test to warrant the issuance of an injunction because, under Section 25(1)(b) of the [Land Registration Act](#), the proprietary rights of a party rank subject to existing leases, charges, and other encumbrances and to the conditions and restrictions if any shown in the register. In this matter, an adequately executed Legal Charge in favour of the 2nd respondent registered after due diligence exists. The right accrued to the 2nd respondent by dint of the registration of the charge ranks higher on priority than any other right.
20. The 2nd respondent believes that the only recourse the applicant has is an action against the 1st respondent for intermeddling with the deceased's estate.
21. The 2nd respondent, in a comprehensive analysis, asserts that the applicant should have sought to be joined in the Kilifi matter. This would have allowed all issues raised by the parties to be addressed in a unified manner, avoiding the need for piecemeal litigation before different forums.
22. Citing the decision in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, a case highlighting what irreparable loss entails, proffers that the applicant will not suffer irreparable loss, the 2nd respondent insists that the applicant does not stand to suffer loss in this matter if an injunction was declined because she can bring an action against the 1st respondent for intermeddling with the estate of the deceased.
23. The 2nd respondent believes the balance of convenience tilts in its favour.



24. In a rejoinder, Mr. Lewa contends that the doctrine of res judicata, a legal principle that prevents the same matter from being relitigated between the same parties, does not hold here; he cited the decision in Gladys Nduku Nthuki v Letshego Kenya Limited & another [2022] eKLR, where the Court provided the conditions for the doctrine to apply as follows:

“that the said doctrine applies to both suits and applications as was held in Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of res judicata, there must be:

- i. a previous suit in which the matter was in issue;
- ii. the parties were the same or litigating under the same title;
- iii. a competent court heard the matter in issue;
- iv. the issue had been raised again in a fresh suit.”

25. A parallel is drawn that, in this case, the plaintiff herein is not a party in the Kilifi Court case. The plaintiff in this suit does not represent the interests of the plaintiff [Mombasa Cement Limited] in the Kilifi Court case, in this suit. The plaintiff [Mombasa Cement Limited] in the Kilifi Court case does not represent the interests of the plaintiff herein in the said suit in any way or at all. The plaintiff [Mombasa Cement Limited] in the Kilifi Court case is not a party in the suit herein. The matters in the Kilifi Court case differ from those in the suit. The relief sought by the plaintiff [Mombasa Cement Limited] in the Kilifi court case differs from the reliefs the plaintiff seeks in the suit herein. Whereas in the Kilifi Court case, the plaintiff [Mombasa Cement Limited] is seeking, amongst other orders, a refund of monies it allegedly paid the 1st defendant in the said suit [who is also the 1st defendant in the suit herein], in this suit the plaintiff is seeking for amongst other orders, revocation of the 1st defendant’s title to the suit parcel of land because the same was obtained through fraudulent and or illegal means. The plaintiff in the Kilifi Court case is not the plaintiff in the instant suit.

26. The cases quoted by the parties on the subject matter were appropriate to dispose of the warring issues raised in the pending motions. The threshold to achieve before the grant of an injunction is as held in the Giella Case (supra):

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.” (This is the standard that the applicant must meet to justify the grant of an injunction; in this case, emphasis is supplied).

27. A prima facie case with the probability of success was held in Mrao v First American Bank of Kenya & 2 others [2003] KLR 125, to mean:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

28. From the materials placed before me, the applicant’s claim that the subject matter we are dealing with differs from what the Kilifi Court was handling is invalid. According to the ruling I have read, the Court was dealing with land parcel No.Kilifi/Roka/794 and not parcel No.Kilifi/Oyombo/794. This



property was advertised for sale, which was and still is a subject matter in the Kilifi Court. All the documents in the proceedings indicate that we are dealing with the same subject matter. The applicant did not address this issue appropriately in the averments via affidavit or in the submissions. I had earlier placed this issue to the parties on the effect of the Kilifi matter on the overall Case Management Strategy in this matter or the Kilifi case.

29. In the Kilifi matter, Mombasa Cement sued the 1st and 2nd respondents, claiming acquisition of the land by purchase and seeking a refund. The Magistrate dismissed the application, citing the interest the 2nd defendant had by holding a valid charge over the subject matter. The main suit is still pending and under active litigation. It is that litigation that triggered the advertisement of the subject matter for sale in a market overt in the exercise of the 2nd defendant's Statutory Power of Sale. It triggered the filing of this matter and the motions under discussion.
30. The 1st respondent does not deny that the land was offered as a security but claims that he was tricked and is still desirous of retaining it. He disputes that the plaintiff herein is entitled to the land because she is not the rightful heir of the deceased's estate.
31. The chronology of events, as narrated by the parties in their averments and submissions, on the change of ownership and registration of the property from the deceased to the 1st respondent, how it was charged to the 2nd respondent, and the sale to Mombasa Cement depict a situation that requires all the parties mentioned in this matter and in the Kilifi one to be heard at once. Each party lays claim to the suit property – the applicant – via transmission, as does the 1st respondent. The 2nd respondent claims proprietary right by dint of a legally registered charge and Mombasa Cement (not in these proceedings) – via purchase. Through a full hearing involving all these parties who each claim a stake in the suit property, all issues can be ventilated, heard, thoroughly, and finally determined. I can also see from the averments that the root of the title will be under discussion.
32. The suggestion by the 2nd respondent that the doctrine of res judicata holds in this matter, given the ruling in the Kilifi matter, is moot. The ruling did not fully and finally decide who should be entitled to the suit property. As submitted by the applicant, citing the Gladys Nduku Nthuki Case (supra), the plaintiff here is not the plaintiff in the Kilifi matter; the prayers sought here are pretty expansive compared to the Kilifi case. Mombasa Cement is not litigating on behalf of the plaintiff in this matter.
33. Whereas the plaintiff has shown and demonstrated that there is disclosed a prima facie case with a probability of success and that she stands to suffer irreparable damages if the sale scheduled proceeds, and that the balance of convenience could tilt to her favour, one issue stands out – given the pendency of the Kilifi matter dealing with the same subject matter can this Court issue an injunction direct to injunct the sale of a property in active litigation in another Court? Will the doctrine of sub judice allow it? In Daniel Kipkemoi Bett & another v Joseph Rono [2022] eKLR, Dr. Iur Nyagaka J. captured the principle in this manner:

“The concept of sub judice 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 a 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 reliefs 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 res judicata. Section 6 of the [Civil Procedure Act](#) bars any court from engaging in matters sub judice before them. It 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.”

20. In a recent decision, my brother Justice Mativo discussed the concept of sub judice. This was in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR where he stated as follows: -

“...there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice 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.”

21. 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)*, stated therein as follows: -

“[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.”

32. For sub-judice to attach, as stipulated by the cited judicial decision and Section 6 of the *Civil Procedure Act*:

- a. The present suit in issue has to be directly and substantially in issue in the previous suit between the parties under whom they or any of them claim, litigating with the same title;
- b. Such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya.
- c. The two suits have to be congruent in all aspects, with a likelihood that if all are to proceed, there will likely be outcomes that may lead to conflicting decisions over the same subject matter.



- d. That it will be both a waste of judicial time and resources to undertake two similar causes over the same issue.
 - e. The issues here cannot possibly be migrated to the former suit for trial and final determination.
 - f. Looking at the pleading per se will ipso facto lead a reasonable man to conclude the suits are the same.
34. We have the Kilifi case. The ownership of land parcels Kilifi/Roka/794 is substantially in issue and under consideration by that Court. An application for an injunction was made. It was declined. Because of that, the 2nd respondent proceeded to commence legal procedure in exercising its Statutory Power of Sale of the suit property. The applicant became aware of that process and moved this Court for an injunction. Effectively, it means the injunction will act as a stoppage of the proceedings in the Kilifi case.
35. Whereas the applicant in this matter is not a party in the Kilifi one, the suit property is. All conditions for sub judice could not have been met in this matter (on the same parties litigating). But, if the two suits are allowed to proceed without one being stayed, it may lead to conflicting outcomes over the same subject matter. One has to go first. The applicant has an avenue of applying to be joined as a party and, in the Kilifi action, ventilate the issues raised in this suit or apply to stay the Kilifi cause to give way for this one to proceed. This Court has not been moved to stay the Kilifi proceedings. It has not been moved in its appellate jurisdiction to consider the injunction, which was denied. The applicant has not shown the intention to protect her interest in the Kilifi proceedings before invoking the jurisdiction of this Court.
36. Whereas this Court has jurisdiction to entertain the matter, it cannot issue an injunction to affect a matter pending before another competent Court. As I have said, the Court has not been asked to stay the Kilifi matter, nor has its appellate jurisdiction been invoked.
37. With warring interests over the suit property, it will be up to the applicant to find a way to address the pending suit in Kilifi vis a-vis the progression of this one. This will bring sanity in addressing all the issues raised by the applicant in the suit filed herein and that at Kilifi to avoid the proliferation of suits and the issuance of incongruent outcomes.
38. Application dated 14th December 2023 as duplicated in the one dated 19th December 2023 dismissed with costs.

Dated, signed, and delivered at Malindi Virtually this 23rd day of May 2024

E.K. MAKORI

JUDGE

In the presence of:

Mr. Lewa, for the Applicant

Mr. Mummin H/B for Mangaro, for 1st Respondent

Ms. Wanja, for the 2nd Respondent

Mr. Ojwang, for the 4th Respondent



Clerk: Happy

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