



**Muhiu v Kimani & 3 others (Environment & Land Case
E002 of 2024) [2024] KEELC 4980 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E002 OF 2024**

**JG KEMEI, J
JUNE 24, 2024**

BETWEEN

WILLIAM KIAMA MUHIU PLAINTIFF

AND

FREDRICK KIMEMIA KIMANI 1ST DEFENDANT

NELSON RADING MANGO 2ND DEFENDANT

THE LAND REGISTRAR, RUIRU 3RD DEFENDANT

HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Before Court is the Plaintiff/Applicant's Notice of Motion Application dated 13/12/2023 expressed under Sections 1A, 1B, 3A, 6, and 18 of the [Civil Procedure Act](#) seeking orders that;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of this Application, the Honorable Court be pleased to issue an order of stay of further proceedings in Thika CMELC No. E116 of 2023; Fredrick Kimemia Kimani Vs. Nelson Rading Mango.
 - d. This Honorable Court be pleased to transfer Thika CMELC No. E116 of 2023; Fredrick Kimemia Kimani Vs. Nelson Rading Mango to this Court for trial and final disposal.
 - e. This Honorable Court be pleased to order that Thika CMELC No. E116 of 2023; Fredrick Kimemia Kimani Vs. Nelson Rading Mango be consolidated with the instant suit for trial and final disposition.



- f. This Honorable Court be pleased to order the OCS commanding Ruiru Police station to release to the Plaintiff all the Completion documents as particularized in the Inventory dated 30th November 2023.
 - g. The Honorable Court be pleased to issue an order restraining police officers from Ruiru Police Station or any other police station from arresting, harassing, summoning, confiscating completion documents in respect to the suit land or in any way whatsoever interfering with the Plaintiff in respect to the suit land.
 - h. The costs of this application be provided for.
2. The Application is premised on the grounds that the parties in the two suits are substantially the same; the subject matter in the suits is the same namely LR. NO. Ruiru Kiu Block 3/1073 (hereinafter the suit land); the Chief Magistrate's Court lacks pecuniary jurisdiction to entertain the suit because the suit land is worth at least Kshs.22M; the 1st Defendant has misused the criminal justice system and police power to interfere with a civil transaction and only this Court has supervisory jurisdiction over subordinate Courts and authoritative bodies like Kenya police service; the 1st Respondent excluded the Applicant from the Chief Magistrate's Court case despite knowing his interest in the suit land and lastly that if the suits are not consolidated, there is a possibility of both Courts reaching parallel decisions.
 3. In his Supporting Affidavit of even date William Kiama Muhu, the Applicant rehashed the above grounds. He annexed copies of the pleadings and Orders in the subordinate Court as WKM-1a & b; copies of the suit land official search, green card and sale agreement between him and the 2nd Defendant herein as WKM-2 a, b & c and WKM-3 respectively; bundle of bank transfer applications and slips in favor of Nelson Rading Mango (Kshs. 6M), Mwananchi Credit Ltd (Kshs. 11,946,107/=) and Mistan Auctioneers (Kshs. 291,088/=) annexed as WKM-4, 5 & 6 respectively. That the Applicant met the 2nd Defendant's spouse and duly obtained the spousal consent (WKM-7) and the Applicant deputized Mrs. Margaret Kimani to effect the transfer.
 4. The Applicant deponed that at the instigation of the 1st Defendant, Mrs. Margaret Kimani was waylaid and arrested by DCI officers and the documents in her possession confiscated by officers at Ruiru Police Station. See inventory of the documents marked WKM-8. Thereafter the 1st Defendant staged a violent break-in into the suit land and illegally placed third parties in the house before filing the Thika Chief Magistrate's Court case. That his attempt to follow up the release of the documents from Ruiru Police Station was in vain. The Applicant added that after he paid the redemption amount to Mwananchi Credit, he received the discharge of charge, paid for stamp duty but the 2nd Defendant clocked the registration by way of an injunction issued in the Thika Chief Magistrate's case. See Bundle WKM-11 containing the discharge of charge and stamp duty receipts. That on advice from his counsel, the Applicant urges this Court to exercise its power to withdraw and transfer the Thika Chief Magistrate's Court case and order consolidation of the suits for timely disposal.
 5. Opposing the application, the 1st Defendant Fredrick Kimemia Kimani raised a Preliminary Objection dated 6/2/2024 against the Application and entire on grounds that; -
 - a. The Plaintiff's entire suit and Notice of Motion Application dated 13th December 2023 is incompetent as it offends the sub judice rule within the meaning of Section 6 of the [Civil Procedure Act](#) as there is an already existing suit in Thika Cmelc No. E116 Of 2023; Fredrick Kimemia Kimani V Nelson Rading Mango instituted on 30th November 2023 between the same parties and concerning the same subject matter which is still pending adjudication.



- b. This suit has been brought to this Court in clear disregard of the above suit and is therefore an abuse of the due process and the same should be struck out with costs.
6. On his part, the 2nd Defendant Nelson Rading Mango swore his Replying Affidavit on 1/2/2024. It was his disposition that he is the registered owner of the suit land; the subject matter in both suits. See annexure NRM-01, copy of his certificate of lease issued on 15/6/2021. That he entered into a sale agreement with the Applicant dated 6/11/2023 for sale of the suit land at a consideration of Kshs. 22M as per NRM-02, copy of the said sale agreement. That both parties have substantially performed their obligation under the Agreement and one of the covenants was for the Applicant to settle the redemption amount owed to Mwanananchi Credit.
 7. That the gist of the Thika Chief Magistrate's Court case is the rescinded sale agreement dated 15/9/2023 between the deponent and the 1st Respondent herein. According to that Agreement, the 1st Respondent was to get vacant possession of the suit property upon payment of a deposit of Kshs. 2M which he admits was paid on 20/9/2023. That upon executing the agreement, the 2nd Respondent's wife expressed her reservations regarding the sale of the suit property which, according to the 2nd Respondent, is a matrimonial property. That the 1st Respondent was displeased with the 2nd Respondent's spouse stand and employed various tactics to get the 2nd Respondent to vacate the suit land. The 2nd Respondent avowed that he embarked on google search of the identity of the 1st Respondent and discovered that he was implicated in multiple Court cases over land fraud allegations leading him to enter into a second agreement to rescind the sale agreement dated 15/9/2023. See annexures marked NRM-5 and NRM-6.
 8. That after agreeing to rescind that Agreement, the 2nd Respondent asked for the 1st Respondent's bank account details to refund the deposit which he was unable to fulfil on 28/11/2023 as he was on transit from Mombasa to Nairobi. That as the deponent was preparing to refund the monies on 29/11/2023 and unbeknownst to him, the 1st Respondent filed a suit in Ruiru Court and later Thika Court and obtained adverse orders against him. That on 30/11/2023 his house was invaded by goons prompting him to report the incidence at Kahawa Sukari police station. At the station he was advised to seek eviction orders from Court to remove any trespass from his home. He maintained that he has never refused to refund the 1st Respondent his monies in light of the message extracts marked NRM-07. In similar breath as the Applicant, he deposed that the Thika Chief Magistrate's Court lacks jurisdiction to entertain the suit as the subject value of the suit land is Kshs. 22M and urged this Court to allow the Application as drawn.
 9. On 15/5/2024 directions were taken and parties elected to canvass the Application and Preliminary Objection by way of written submissions.
 10. The Applicant through the firm of Manasseh, Mwangi & Associates filed submissions dated 16/5/2024 while the 2nd Respondent's submissions by the firm of B.V Francis & Associates Advocates submissions are dated 21/5/2024.
 11. The 1st, 3rd and 4th Respondents did not file any submissions.
 12. The Applicant drew four issues for determination; whether the Applicant has satisfied the requirements for transfer of the Thika Chief Magistrate's case to this Court; whether the Thika Chief Magistrate's case should be consolidated with this suit; whether the Preliminary Objection dated 6/2/2024 is merited and who bears costs.
 13. On the first issue, the Applicant cited Section 18(1)(b) of the *Civil Procedure Act* on this Court's power to transfer suits on application by a party or suo moto. That the two suits are identical and the



Applicant filed an application to be enjoined in the Thika suit which was allowed on 6/2/2024. That as Interested Party he cannot seek any substantive prayers in the suit. That the Thika Chief Magistrate's Court lacks pecuniary jurisdiction to determine the suit noting the purchase price of the suit land was Kshs.22M.

14. On merits of the Preliminary Objection, the Applicant answered in the negative. He posited that his averment that the trial Court lacks pecuniary jurisdiction has not been controverted. That the parties herein are not the same as those in the Thika Chief Magistrate's Court and as such the Preliminary Objection calls for evaluation of evidence.
15. The main issues for determination are;
 - a. Whether the Preliminary Objection is merited;
 - b. Whether the Application is merited.

Preliminary Objection

16. The doctrine of sub judice is founded under Section 6 of the [Civil Procedure Act](#), Cap. 21 which provides as follows;

“

- “6. 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.

Explanation - The pendency of a suit in a foreign Court shall not preclude a Court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign Court”.

17. Numerous decisions have put this issue in perspective. In the case of Kenya National Commission on Human Rights Vs. Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) eKLR, the Supreme Court held;

“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.”

1. The 1st Respondent avers that there is another suit namely Thika CMELC No. E116 of 2023; Fredrick Kimemia Kimani Vs. Nelson Rading Mango filed on 30th November 2023 between the same parties and concerning the same subject matter which is still pending adjudication. The Applicant claims that he is not a party to that suit though in his submissions he indicated



that he was enjoined as an Interested Party. Denying the Preliminary Objection, the Applicant also stated that the Thika Chief Magistrate's Court lacks pecuniary jurisdiction in light of the subject value of the suit land.

2. In the case of *Mukisa Biscuits Manufacturing Ltd Vs. West End Distributors (1969) EA 696* a plea of limitation was held to constitute a Preliminary Objection as follows;

“...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”.
20. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
21. Undoubtedly the question of jurisdiction goes to the matter of the matter. This is because without jurisdiction a Court must down its tools. See the case of *The Owners of Motor Vessel “Lilian S” Vs. Caltex Oil Kenya Limited (1989) KLR 1*. The first test is thus satisfied. A Preliminary Objection would also succeed if it's argued on assumption that all the facts pleaded by the rival party are correct. In this case the Applicant objection of pecuniary jurisdiction is opposed by the 1st Applicant and therefore the second limb fails. Finally, for this Court to determine the veracity of the allegations put forward by 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.
22. Accordingly, the Preliminary Objection in my view is not merited and it is for dismissal.

Stay of proceedings

23. The law on stay of proceedings is generally provided for in Section 6 of the [Civil Procedure Act](#) to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another Court ought to stay its proceedings in respect of such suit.
24. Section 81 (2) (h) [Civil Procedure Act](#) bespeaks to consolidation of suits, appeals and other proceedings. The Civil Procedure Rules also alludes to stay of proceedings under Order 42 Rule 6(1) as follows;

“Stay in case of appeal [Order 42, rule 6.]

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from



whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.”

25. In the case of *Global Tours & Travel Limited Vs. Five Continents Travel Limited* [2015] eKLR where it was held that:-

“ ... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

26. Moreover, in *William Odhiambo Ramogi & 2 Others Vs. The Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited Vs. Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein Vs. Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and



f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”

27. Flowing from the above jurisprudence, it is emerging that whether or not to grant an order for stay of proceedings is a discretionary judicial power. This discretionary power must be exercised judiciously and sparingly. The Court has to consider if it will be in the interests of justice to grant the same. In this case the Applicant urges this Court to stay proceedings in the trial Court on account of pecuniary jurisdiction. He averred that the subject land according to the sale agreement marked (WKM3) Kshs. 22M. In opposing the instant Motion, the 1st Respondent raised a Preliminary Objection on sub judice only but did not controvert the Applicant’s assertion of the value of the land being Kshs. 22M as beyond the Chief Magistrate’s jurisdiction.
28. It is not disputed that the subject matter herein forms the subject property in Thika Chief Magistrate’s Court. The causes of action for both rival parties arise from the sale of the said suit land. The Applicant herein vide his plaint dated 13/12/2023 inter alia seeks a declaration that he is the lawful owner of LR NUMBER RUIRU KIU BLOCK 3/1073 and eviction of the 1st and 2nd Defendants from the said land. On the other hand, the 1st Defendant is seeking a permanent injunction against the 2nd Defendant or any person whatsoever from transferring or charging the suit land and an order for specific performance to complete the sale agreement dated 11/10/2023 in respect of LR NUMBER RUIRU KIU BLOCK 3/1073. It is evident therefore that the prayers sought stem to ownership of the suit land, LR NUMBER RUIRU KIU BLOCK 3/1073.
29. Certainly, if both Courts proceed to determine the suit, there is a likelihood of reaching parallel decisions that may embarrass the Court process. The objective of the *Civil Procedure Act* in Section 1A is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. Further Section 1B *Civil Procedure Act* provides;

“1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”

30. Section 18 of the *Civil Procedure Act* provides;

“18. Power of High Court to withdraw and transfer case instituted in Subordinate Court

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or



of its own motion without such notice, the High Court may at any stage—

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
- (b) withdraw any suit or other proceeding pending in any Court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

- 2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

31. In my view the overriding objective of the *Civil Procedure Act* and Duty of Court enumerated above will best be achieved if this Court exercised the power to transfer suits donated by Section 18 of the *Civil Procedure Act*. Indeed, it would lead to wastage of time and limited judicial resources for two Courts hearing 2 cases which could have been heard and fully determined by one Court. I rely on the Court of Appeal case of Kenya Medical Research Institute Vs. Davy Kiprotich Koech [2018] eKLR where the Court cited with approval the case of Kagenyi Vs. Musiramo & Another [1968] EA 43 that before a transfer can be affected, the Court effecting the transfer must have the jurisdiction to order such transfer. In this case this Court is empowered to order such transfer.

32. Final Orders;

- a. The Preliminary Objection dated 6/2/2024 is unmerited. It is dismissed.
- b. The Application dated 13/12/2023 succeeds in terms of prayers c and d only.
- c. Each party to bear their own costs

33. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Kipnetich HB Mwangi for Plaintiff



Ms. Waweru HB Orege for 1st Defendant

Ogilla for 2nd Defendant

3rd and 4th Defendants - Absent

Court Assistants – Phyllis & Oliver

