



Natembeya (As legal representatives of the Estate of Peter Natembeya Wenani) & another v Wenani & 4 others (Environment & Land Case E002 of 2023) [2024] KEELC 4822 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4822 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E002 OF 2023

EC CHERONO, J

JUNE 20, 2024

BETWEEN

PHILICHON SIMIYU NATEMBEYA (AS LEGAL REPRESENTATIVES OF THE ESTATE OF PETER NATEMBEYA WENANI) 1ST PLAINTIFF

EDWRD WALIMBWA (AS LEGAL REPRESENTATIVES OF THE ESTATE OF JAVAN WALIULA WENANI) 2ND PLAINTIFF

AND

CONSTANT MARUTI WENANI 1ST DEFENDANT

MOSES MIRUNI WENANI 2ND DEFENDANT

BRIAN MASIKA WENANI 3RD DEFENDANT

EDWIN WALIULA WENANI 4TH DEFENDANT

KIKAI COOPERATIVE SOCIETY LIMITED 5TH DEFENDANT

RULING

1. By a Notice of Motion dated the 1st March, 2023 brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 40 Rule 1& 4 of the Civil Procedure Rules, 2010, the Applicants seek for the following orders:
 - a. Spent
 - b. Spent
 - c. THAT this honourable court be pleased to grant an order of inhibition inhibiting the registration of any dealing in respect of land parcel No. Malakisi North & Central Namwela/ 1301,1302,1302,1428 and 1429 by way of



transfer, charge, lease, subdivision or any other dealing pending the hearing and determination of this suit.

- d. Spent
- e. THAT this honourable court be pleased to grant a temporary injunction restraining the 5th respondent by themselves, servants, agents, assigns and or whomever in any means from entering, occupying, tilling, constructing, fencing, carrying on developments or in any way utilizing land parcel number Malakisi North & Central Namwela/1302 and 1429 pending hearing and determination of the main suit
- f. That costs of this application be provided for.

2. The application is based on grounds on the face of the application supported by the affidavit of PHILICHON SIMIYU NATEMBEYA -the 1st applicant herein sworn on 1st March, 2023
3. In her supporting affidavit, the 1st applicant deposed that the original title number of land parcel number Malakisi North & Central Namwela/134 belonged to and was registered in the name of Wilson Wenani, the grandfather of the applicants and the 1st to 4th respondents herein. She further stated that the said Wilson Wenani died in 1993 and was survived by three sons namely Javan Waliula Wenanai, Peter Natembeya Wenanai and Jod Wekesa Wenanai who lived with their families on the said land. The applicant stated that succession for the estate of Wilson Wenani was not done and that sometime in the year 2019, they discovered that the 1st defendants father had secretly registered Malakisi North & Central Namwela/134 in his name.
4. The 1st applicant also deposed that subdivision of Malakisi North & Central Namwela/134 was done giving rise to 4 plots i.e Malakisi North & Central Namwela/1300-1303 in the name of Job Wekesa in the year 2016 yet he died in the year 2015. That through Sirisia Succession Cause No. 12 of 2019, the 1st to 4th Respondents did a succession for the estate of Job Wekesa and Malakisi North & Central Namwela/1300 was registered in the name of the 2nd and 4th respondents through transmission. It is further stated that upon such registration, the 1st-4th respondents through Sirisia ELC NO. E009 of 2021 obtained temporary injunctive orders restraining them from using the land pending determination of the suit. It is deposed that the 5th respondent thereafter entered Malakisi North & Central Namwela/1300 claiming purchasers interest.
5. The applicants deposed that upon conducting a search at the lands office, they found out that Malakisi North & Central Namwela/1300 had been sub-divided into Malakisi North & Central Namwela/1428 and 1429 and that Malakisi North & Central Namwela/1429 and Malakisi North & Central Namwela/1302 had been registered in the name of the 5th defendant. They stated that the 5th respondent who has been a neighbour knew his co-respondents did not have good title to pass. It was their case that Malakisi North & Central Namwela/1301 and 130 are in the name of Job Wekesa Wenani while Malakisi North & Central Namwela/1428 a subdivision of Malakisi North & Central Namwela/1300 was vested in the name of the 2nd and 4th respondents. Lastly, the applicants stated that they are on the verge of being disinherited despite being beneficiaries of the estate of Wilson Wenani.
6. The respondents in opposition to the application filed a Notice of preliminary objection dated 23rd March, 2024 where they averred as follows;
 - a. The plaintiff's lack locus standi to initiate and sustain this suit.
 - b. The suit herein is res sub judice Sirisia ELC Case No. E009 OF 2021 between the parties herein.



- c. The instant application is res judicata the application dated 31st March, 2021 filed in Sirisia ELC Case No. E009 of 2021 and which was determined vide the ruling delivered on 15th December, 2021.
- d. The 5th Defendant is a cooperative Society that cannot be sued in its name and thus the 5th defendant is legal fathoms.
7. Directions were subsequently taken to have the Notice of Motion and the Preliminary objection canvassed by way of written submissions.
8. The plaintiffs/applicants filed submissions dated 7th June, 2024 where they submitted that they have attached their respective letters of administration to the application and as such, they have locus standi. On the issue of res judicate and sub judice, they submitted that this suit and that suit filed in Sirisia are different. It was their contention that the issue of ownership which is the main issue in this suit was not resolved in the Sirisia case. On the issue that the 5th defendant/respondent cannot be sued in its name, they relied on the provisions of Section 12 of the Co-operatives *Societies Act* and submitted that the 5th defendant/respondent is a body corporate which can sue and be sued. They cited the case of Rashid Kogi Muturi(Suing on his own behalf and on behalf of members of Thika Muslim Housing Co-Operative Society Limited vs. Screen Check Limited & Another(2019)eKLR and Mwangi(Suing for and on behalf of the Chairman, Athara Farmers Shareholders Complaint Committee) vs. Attorney General & 7 Others(2022)KEELC 13730(KLR). Finally, they urged the court to allow their application.
9. The defendant/respondents filed their submissions dated 22nd May, 2024 where they submitted on the issue of the applicants lacking locus standi to bring the current suit on grounds that the property in question belonged to Wilson Wenanai and as such, only his personal representatives can bring a suit with regards the land. Reliance was placed in the case of Melickzedek Shem Kamau vs. Beatrice Waithera Maina & 2 others(2020) eKLR. On whether this suit was res sub judice, it was submitted that the issue in contention in the Sirisia case is Land parcel No. Malakisi North & Central Namwela/1300-1302 while the issue in the current suit is land parcel No. Malakisi North & Central Namwela/1300-1303 where they allege the defendant/respondents obtained fraudulently. They argued that the two issues in the separate cases were similar and that this court is barred by the provisions of Section 6 of the *Civil Procedure Act* from determining this matter. Reliance was placed in the case of Daniel Kipkemoi Bett & Another vs. Joseph Rono (2022) eKLR.
10. On the third issue whether this suit is res judicata, it was subdivided that as can be seen from the ruling attached to the application, the defendant/respondents herein obtained injunctive orders against the plaintiff/applicants herein in the Sirisia case restraining them from dealing with Malakisi North & Central Namwela/1300. They argued that from the foregoing, the issues for determination in the Sirisia case and this case are similar and so are the parties involved. It was therefore argued that the application for injunction was res judicata and cannot be dealt with by this court. They cited the case of Kennedy Mokua Ongiri vs. John Nyasende Mosioma & Florence Nyamoita Nyasende(2022)eKLR among others. Finally, they submitted that the 5th defendant cannot be sued in its own name as being a co-operative society, it cannot sue or be sued. Reliance was placed in the case of Hathing Self Help Group⁹with a membership of 293 members and suing through its registered officials James Nzeru Musembei, Daniel Mutinda Ndwiki and Harrison Mutunga Wambua) vs. Co-operative Bank Housing & Another (2021) eKLR. In conclusion, they asked the court to dismiss the plaintiff's application and suit with costs.



11. I have considered the pleadings including the Notice of Motion application dated 1st March, 2023, by the plaintiff/Applicant, the notice of preliminary objection, the written submissions on the subject matter by the parties, the cited authorities and the relevant provisions of the law.
12. Having considered the materials placed before me, I find that the following are the issues that commend for determination;-
 - a. Whether the notice of preliminary object has merit
 - b. Whether the plaintiff/applicant has made a case for the orders sought
 - c. Who bears the costs of the application.
13. On the first issue, the defendant/respondents filed a Notice of Preliminary Notice dated 23rd March, 2024 on four grounds. A preliminary objection was defined in the case of Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd. Civil Appeal No. 9 of 1969 (1969) EA 696 where the Court held that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

“A preliminary objection is in the nature of what used to be called demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion.”

15. Also in the case of Oraro v Mbaja [2005] 1 KLR 141 the court held as follows:

“...A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....” (Emphasis added).

(i) Locus standi

14. Locus standi connotes ‘a right to bring an action’. In the case of Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR while referring to the matter of Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 the Court held that ;

“...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population.”



15. Further in the case of *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR the Court held that ;

“...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general.”

16. The question therefore is whether the plaintiffs/applicants have a recognizable interest in Malakisi North & Central Namwela/134 and the resultant sub-divisions. It is not in doubt that Malakisi North & Central Namwela/1300-1303 and Malakisi North & Central Namwela/1428 and 1429 subdivided from Malakisi North & Central Namwela/1300 are subdivisions of Malakisi North & Central Namwela/134 which belonged to Wilson Wenani, the grandfather of the parties herein save for the 5th defendant/respondent. The plaintiffs/applicants herein bring this suit as beneficiaries of the estates of their respective fathers, Javan Waliula Wenani and Peter Natembeya Wenani both of who are sons of Wilson Wenani. Their claim is that Malakisi North & Central Namwela/134 was fraudulently transferred to the name of 1st-4th Defendant/Respondent father and subsequently to them and to a Third Party. Therefore, it follows that they have a right to protect and seek reliefs over the said property. I therefore find that the plaintiffs/applicants have the capacity/legal standing to institute this suit.

(ii) Sub judice

17. The doctrine of sub judice is founded under Section 6 of the *Civil Procedure Act*, CAP. 21 Numerous decisions have put the issue into perspective. In the case of *Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others* (2002) e KLR, the Supreme Court of Kenya 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”.

18. The defendant/respondents argue that the subject matter before this court is directly in issue in *Sirisia SPMCC ELC No. E009 OF 2021*. However, copies of pleadings in this other case has not been supplied/annexed/attached to the pleadings herein to enable this Honourable Court interrogate the same to determine whether this suit is indeed su-judice. What the defendants/respondents seek to rely on is a copy of a ruling delivered on 15/12/2021 attached to the plaint herein. . From a cursory look at the said ruling, it appears the subject property of litigation in *Sirisia* is land parcel Malakisi North & Central Namwela/1300. The plaintiff/applicants in this suit are claiming land parcel no. Malakisi North & Central Namwela/1301,1302 and 1303. Further, the issue of sub-judice as raised does require the ascertaining of facts or probing of evidence in the alleged former suit which this honourable court is not privy to.



19. It follows therefore that the issue of sub-judice is not a pure point of law capable of being considered as a preliminary objection properly raised and does not meet the threshold of what in law amounts to a preliminary objection.

(iii) Res Judicata

20. The doctrine of sub judice is found under Section 7 of the Civil Procedure Act, CAP. 21 and is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be vexed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR. In determining whether a suit is res judicata, a Court should look at all the four corners set out in Section 7 of the Civil Procedure Act namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
21. On examination of the objection as pleaded as between this suit and the suit in Sirisia, it is my considered view that neither of the above requirements have been met. I must mention though that it is possible that the issues for determination in this suit will be parallel with those in the Sirisia suit. It is puzzling that the status of that case has not been disclosed to this court by either party.

(iv) 5th defendant/respondent's capacity to be sued

22. It has been submitted that the 5th defendant being a cooperative society cannot be sued in its name. The 5th defendant/respondent in this suit is identified as KIKAI CO-OPERATIVE SOCIETY LIMITED. In this regard, its governed by the Co-operative Societies Act, CAP 490 of the Laws of Kenya and not The Societies Act CAP 108 of the Laws of Kenya as alluded to by the defendant/respondents. There is a difference between these two Act's where the latter covers social, cultural and charitable interests while the former prioritizes economic cooperation and such other interests.
23. Therefore, upon registration as a Co-Operative Society, a SACCO enjoys certain privileges as set out under Section 12 of CAP 490 which provides that:-
- “Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.”
24. See the case of Joseph Muthuri Ikunyua & 32 others v Co-operative Bank of Kenya Limited & 14 others [2018] eKLR where the Court held that;
- “Just like a company a co-operative society is recognized as a separate legal entity from its members for it has the capability to own property, to sue or be sued and enter into contracts in its own name. In this regard, the 3rd defendant, as a body corporate, entered into a banking facility with the 1st defendant separate from its members and holds the suit property independent of its members. See Salomon v A Salomon and Co Ltd [1897] AC 22 “
25. Therefore, it is my considered view that the preliminary objection lacks merit and the same is dismissed.



26. Turning to the prayers sought in the Notice of Motion application, the plaintiff/applicants pray for an order of inhibition and an injunctive order against the defendant/applicants from dealing with land parcel no. Malakisi North & Central Namwela/1301,1302,1303,1428 and 1429.
27. The plaintiffs/applicants base their argument on grounds that the 1st-4th defendants shared land parcel No. Malakisi North & Central Namwela/134 which they state forms part of the estate of Wilson Wenani among themselves, thereby denying the plaintiffs/applicants their rightful share. From the evidence and submissions presented, land parcel No. Malakisi North & Central Namwela/134 has already been sub-divided and even disposed of to a third party. The defendant/respondents did not put in a replying affidavit. As such, the averments by the applicants on oath have not been controverted.
28. In the case of Dorcas Muthoni & 2 others v Michael Ileri Ngari (2016) eKLR B. N. Olao J observed as follows:
- “An order of inhibition issued under section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the owner of the property under dispute from registering any transaction over the said property until further orders or until the suit in which the property is a subject is disposed off. The court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial.”
29. Similarly, in the case of Japhet Kaimenyi M’Ndatho v M’Ndatho M’Mbwiria (2012) eKLR the conditions necessary for the grant of an order of inhibition were stated as follows:
- “a) That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant, unless preservatory orders of inhibition are issued.
- b) That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.
- c) That the applicant has an arguable case.”
30. Section 68(1) of the Land Registration Act of 2012 provides as follows:
- (1)) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
31. The application before the trial court was for orders which are equitable reliefs ideally granted at the discretion of the court. The Court in determining whether to grant such orders will warn itself that at this stage, it is not dealing with the disputed facts on merit but only determining whether the applicant is deserving of inhibition orders which as stated above, are prohibitory injunction. Further, the court is to take into account that the such orders are issued whenever the suit property is in danger of disposition or alienation before the issues in the suit are heard and determined to finality.
32. The court in upholding the principle of the lower risk of injustice in the case of Films Rover International & others v Cannon Films Sales Ltd (1986) 3 All ER 772 stated as follows:
- “It is my view that the injustice that would be caused to the Defendants/Respondents if the Plaintiffs/Applicants were granted the prayer inhibition and later failed at the trial



outweighs the injustice that would be caused to the Plaintiffs/Applicants if the prayer for inhibition was dismissed and they succeed in proving their case. Basing the two competing interests, the cause of justice will best be served if the order of inhibition is granted.”

33. From the facts as presented and since they are not controverted affidavit evidence, it emerges that the defendant/respondents have subdivided the land and even sold to third parties. The plaintiffs/applicants are apprehensive that the defendant/respondents will continue sub-dividing and disposing off the properties in issue while this suit is pending.
34. I therefore find that there is a real danger of the defendant/respondents dealing with the suit properties in a manner which will be prejudicial to the plaintiff/applicants and which will defeat the ends of justice. It is therefore my finding that the plaintiff/applicants have demonstrated that the inhibition orders are necessary in the circumstances.
35. The plaintiff/applicants sought for injunctive orders against the 5th defendant/respondents from occupying and utilizing land parcel No. Malakisi North & Central Namwela/1302 and 1429. It has been stated that the 1st-4th defendant/respondents upon subdividing the larger portion, sold land parcel No. Malakisi North & Central Namwela/1302 and 1429 to the 5th defendant/respondent who is now the registered owner. To be able to attract an Order of temporary injunction, the Plaintiff/Applicant must establish the principles set out in the case of *Giella v Cassman Brown* (1973) EA 358 as well as the case of *Nguruman vs Jan Bonde Nielsen & 2 Others* CA No. 77 of 2012 (2014) eKLR.
36. A prima facie case with chances of success was discussed in the case of *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) EKLR. The plaintiff/applicants argue that they are the beneficiaries of the estate of one Wilson Wenani who is the initial owner of the suit land. They argue that Job Wekesa Wenani transferred title of land parcel No. Malakisi North & Central Namwela/134 to himself without filing a succession cause leaving out the other beneficiaries of the estate, whose interests the plaintiff/applicants assert. I have looked at the green card attached to the supporting affidavit as P1 and confirm that indeed Wilson Wenani was the initial registered owner of the larger portion. The letter by the area chief introducing Wilson Wenani's family also confirms that Javan Waliula Wenani and Peter Natembeya Wenani are his children thus eligible as beneficiaries. The plaintiff/applicant's case has not been rebutted by the defendant/respondents and as such I am persuaded that the plaintiff/applicants have demonstrated sufficient interest in the parcels of land. Therefore, it is my considered view that a prima facie case has been established.
37. Secondly, The Plaintiffs/applicants have to demonstrate that they will suffer irreparable injury unless the temporary injunction is granted. The judicial decision of *Pius Kipchirchir Kogo Vs Frank Kimeli Tenai* (2018) eKLR the court defined what irreparable injury means and stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.
38. The plaintiff/applicants have stated that they reside in the property in issue and that they stand to be disinherited and rendered destitute if the orders sought are not granted. In my view, the argument that this is an ancestral home and the only home the plaintiff/applicants know coupled with the absence of contrary set of facts are sufficient grounds to show that indeed they shall suffer irreparably if the orders sought are not issued.



39. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. See the case of Paul Gitonga Wanjau Vs Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR. Further, the decision of Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated;

“The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.”

40. It is therefore y considered view that the plaintiff/applicant is worthy of the orders or temporary injunction as sought.

41. On the issue on costs; section 27 of the Civil Procedure Act provides that costs shall follow the event. The successful party shall ordinarily have costs.

42. The upshot of my analysis and evaluation is that the application dated 1st March, 2023 is merited and the same is allowed in the following terms;-

- a. An order of inhibition be and is hereby issued inhibiting the registration of any dealing in respect of land parcel No. Malakisi North & Central Namwela/ 1301,1302,1302,1428 and 1429 by way of transfer, charge, lease, subdivision or any other dealing pending the hearing and determination of this suit.
- b. An order of temporary injunction be and is hereby issued restraining the 5th respondent by themselves, servants, agents, assigns and or whomever in any means from entering, occupying, tilling, constructing, fencing, carrying on developments or in any way utilizing land parcel number Malakisi North & Central Namwela/1302 and 1429 pending hearing and determination of the main suit.
- c. Costs of the application are awarded to the Applicants.

DATED and SIGNED and DELIVERED at BUNGOMA this 20th day of June, 2024.

.....
HON.E.C CHERONO

ELC JUDGE

In the presence of;

SUBPARA 1.

Mr. Oira H/B for Lunani for plaintiff/Applicant

SUBPARA 2.

Mr. Anwar for the Defendant/Respondent

SUBPARA 3.

Bett C/A

BUNGOMA RULING ELCC CaSE NO. E002 OF 2023	0 OF 20
--	---------

