



REPUBLIC OF KENYA



KENYA LAW
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**Ethics and Anti-Corruption Commission v Mbasu & 15 others; Kenya
Revenue Authority (Interested Party) (Environment & Land Case
21 of 2023) [2024] KEELC 4675 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 21 OF 2023**

NA MATHEKA, J

JUNE 11, 2024

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

EM MBASU 1ST DEFENDANT
D KAMENE 2ND DEFENDANT
M WANJIRU 3RD DEFENDANT
SCLERACA LIMITED 4TH DEFENDANT
CINTY MUENI MALIKA 5TH DEFENDANT
KIPCHUMBA KANDIE 6TH DEFENDANT
SUNNEX ENTERPRISES LIMITED 7TH DEFENDANT
ANISH MAHESHKUMAR DOSHI 8TH DEFENDANT
SUNIR MAHESHKUMAR DOSHI 9TH DEFENDANT
DELGREEN LIMITED 10TH DEFENDANT
SHEILA DOSHI 11TH DEFENDANT
ASHOK LABHSHANKER DOSHI 12TH DEFENDANT
PRATIBA ASHOK DOSHI 13TH DEFENDANT
DOSHI GROUP OF COMPANIES 14TH DEFENDANT
WILSON GACHANJA 15TH DEFENDANT
SAMMY SILAS KOMEN 16TH DEFENDANT



AND

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

1. The application dated 11th December 2023 by the 11th -14th Defendant and is brought under the provisions of Section 1A & 3A of the Civil Procedure Act Order 2 Rule 15 (1) (d) of the Civil Procedure Rules seeking the following orders:
 1. That the suit herein be struck out as it is otherwise an abuse of the process of the court.
 2. That costs of the suit and of the instant application be borne by the plaintiff.
2. The said application is premised on the doctrine of res sub-judice in the sense that there is another suit Mombasa ELC No. 55 of 2008 where the 11th defendant has sued several defendants who are in occupation of the L.R No. Mombasa Island/Block XXVI/1015 and that the interested party was joined as a defendant sometime in 2015. Hence the issues of ownership and how it was acquired that will be determined in this suit will also be determined in that suit.
3. Counsel for the 8th, 9th and 10th defendant entered appearance on 31st January 2024 and filed a notice of preliminary objection on 28th February 2024 for wrong joinder of parties as they had been sued in their personal capacities as opposed to their capacity in a company.
4. The plaintiff through Alex Mugambi Mbae filed a replying affidavit sworn on 18th March 2024 stated that the plaintiff as an independent body has the mandate under section 11 (1) (j) of the EACC Act 2011 and the Anti-Corruption and Economic Crimes Act to recover public land on behalf of the government and stated that Mombasa Island/XXVI/ 1015 is one of the public lands. Furthermore, Mr. Mugambi stated the instant suit is different from Mombasa ELC 55 of 2008.
5. Counsel for the 11th to 14th defendant argued in their written submissions that under section 6 of the Civil Procedure Act, the proper and necessary parties in the instant suit are also litigating in Mombasa ELC 55 of 2008 hence this suit is sub judice. Counsel relied on Civicon Limited vs Kivuwatt Limited & 2 others (2015) eKLR. Counsel argued that the interested party is capable of suing and being sued and can thus protect its own interests. Counsel also relied on R vs Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya (2020) eKLR where the court held that in the use of the sub judice rule, the court does not look at the prayers but the substance of the suit and that addition of parties in a subsequent suit cannot defeat the sub judice rule. Counsel also relied on the Kihara case (supra) to show that the plaintiff's suit amounts to an abuse of the court process and ought to be struck out while relying on Fremar Construction Co. Ltd vs Mwakisiti Navi Shah (2005) eKLR.
6. Ms Fatuma Abdulrahim submitted on behalf of the plaintiffs through written submissions and argued that the suit property is part of a larger parcel Mombasa Island/Block XXVI/269 which belongs to the Government specifically the interested party. Counsel reiterated Mr. Mugambi's replying affidavit and cited Order 38 rule 1 and 2 of the Civil Procedure Rules which allows the court to choose one suit as a test case where suits are similar. Furthermore, she argued that the parties are not the same and that the plaintiff has raised substantial claims of abuse of office by the 15th and 16th defendant. Ms. Fatuma relied on Ethics and Anti-Corruption Commission vs Ndubi & 3 Others ELC 359 of 2015 (2022) KEELC 209 (KLR) where the court held in a similar situation that the issue for vacant and exclusive possession is different from the claim of rectification and cancellation of all entries relating to



a title. Counsel suggested that two suits can be consolidated and relied on *Benson G. Mutai v Raphael Gichovi Munene & 4 Others* (2014) Eklr and the Indian Case of *Brij Kishore vs Brij Singh & Others* (L.R 5922 of 2013).

7. I have read and perused the application, replying affidavit and submissions thereto. The issues arising is whether or not the instant suit is sub judice and what prayers can the court grant?

8. The first issue for determination is whether there was sub judice? Section 6 of the *Civil Procedure Act* states 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.

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.”

9. In *Kenya Bankers Association vs Kenya Revenue Authority, 2019 eKLR* the court had this to say on the issue of sub judice;

“in addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The ex parte applicant herein, is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.

10. A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In *Re the matter of the Interim Independent Electoral Commission*, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...”

11. I find that this suit is broader in terms of prayers as it relates to several parcels that emanated from parcel MI/XXVI/269. In *Mombasa ELC 55 of 2008* the prayers are for vacant possession of three plots namely L.R XXXVI/1081, 1082 and 1015 while the claim in this suit is for challenging the subdivision of Mombasa Island/Block XXVI/269 into Mombasa Island/Block XXVI/686 and further into Mombasa Island/ Block XXVI/693, 779, 1015, 1037, 1081 and 1082 without approved part development plans. I find that the subject matter is different and the parties are different save for the 11th defendant and the interested party. This matter is therefore not subjudice. In the upshot, I find that the application is not merited and is dismissed. Costs to be in the cause

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

N.A. MATHEKA



JUDGE

