



**Kasera v Ndege (Sued as the Legal Representative of the Estate of Leonard Ndege - Deceased) & another; Onyango (Interested Party) (Environment and Land Miscellaneous Application E001 of 2024) [2024] KEELC 5376 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5376 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2024**  
**GMA ONGONDO, J**  
**JULY 18, 2024**

**BETWEEN**

**NORA AKINYI KASERA ..... APPLICANT**

**AND**

**REYNOLD NDEGE (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LEONARD NDEGE - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**ROSELINE AWINO OTIENO ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JOSIAH ONYANGO ..... INTERESTED PARTY**

**RULING**

1. The instant ruling is in respect of a preliminary objection as discerned from the grounds of opposition dated 12<sup>th</sup> March 2024 and lodged in court on even date by the interested party through Ondego Garo Advocates and which is based on fifteen grounds including:
  - a. That similar orders have been sought by the interested party against the applicant before Homa Bay Chief Magistrate’s Court Environment and Land Case No. E005 of 2024 where the interested party has sought injunctive orders against the applicant herein on grounds of trespass and illegal occupation of his land.
  - b. That the said interested party’s application was filed on 7<sup>th</sup> January 2024 while this application was filed on 2<sup>nd</sup> February 2024 almost a month later. The court has issued directions to the Land Registrar and the Land Surveyor Homa Bay to prepare a report on among others the issue of trespass by the applicant herein and ownership of the subject land Kanyada Kotieno Katuma A/1180 (the suit land herein).



- c. There is a case pending at the Director of Criminal Investigations at Homa Bay which the interested party/ registered owner had moved to have the applicant removed from the suit land as a trespasser.
2. The applicant through L. K. Obwanda Advocates, opposed the preliminary objection by way of a replying affidavit sworn on 3<sup>rd</sup> July 2024. She deposed, inter alia, that although the suit land herein is also the subject of the proceedings in the magistrate's court, she is not the defendant at the magistrate's court. She admitted being served with documents relating to the suit at the court. She averred that the prayers sought in this case are different from those sought in the suit at the magistrate's court and this court will have to examine the pleadings of both suits to ascertain the same.
3. On 20<sup>th</sup> May 2024, this court ordered and directed that the Preliminary Objection be heard by way of written submissions in the spirit of Article 159 (2)(b) of Constitution of Kenya, 2010.
4. Accordingly, the interested party's counsel filed submissions dated 2<sup>nd</sup> July 2024 and deposed inter alia, that the instant suit offends Sections 6 and 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya. That there is an active suit filed at the Chief Magistrate's Court in Homa Bay- Environment and Land Case No. E005 of 2024 and which is coming up for mention on 29<sup>th</sup> July 2024, to determine the issue of ownership of the suit land. That both the suit at the magistrate's court and in this court relate to the same subject matter.
5. Further, counsel submitted that although this suit seeks substantive orders, it has been instituted as a miscellaneous application thereby contravening Section 2 of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 3 Rule 1 of the Civil Procedure Rules, 2010. To buttress the submissions, counsel relied on the case of Republic v Paul Kihara Kariuki, Attorney General and 2 others ex parte Law Society of Kenya [2020] eKLR, among others.
6. The applicant's counsel filed submissions dated 3<sup>rd</sup> July 2024 and identified four issues for determination to wit: whether the preliminary objection meets the test of a Preliminary Objection and in any case, whether the issue of sub judice may be raised by way of a preliminary objection; whether the court has jurisdiction to determine the suit herein; whether the applicant is entitled to the prayers sought in the Preliminary Objection and whether the Preliminary Objection is merited and who should bear costs of the Preliminary Objection.
7. Counsel submitted that the instant preliminary objection does not raise pure points of law. That for the court to determine whether the application offends the rule of sub judice, it has to delve into material facts in ELC Case No. E005 of 2024 at the Chief Magistrate's Court Homa Bay, which would put the matter outside the ambit of a Preliminary Objection. That essentially, the issue of sub judice cannot be determined by way of a Preliminary Objection. That the court is seized with jurisdiction to determine the issues raised in the application dated 2<sup>nd</sup> February 2024 and the applicant's originating summons of even date herein. That the error that occurred resulting into filing of the suit as a miscellaneous application is in the process of being regularized and the suit ought not to be dismissed on that basis. Thus, counsel urged the court to dismiss the preliminary objection with costs. Reliance was placed on the case of *Mukisa Biscuits Manufacturing Ltd -v- West End Distributors* (1969) EA 696, among others, to reinforce the submissions.
8. It is noteworthy that by originating summons filed herein on 5<sup>th</sup> February 2024, the applicant, Nora Akinyi Kasera, through L. K. Obwanda Advocates is seeking determination of the questions infra;
  - a. Whether the applicant herein is entitled under Section 38 of the Limitation of Actions Act to be registered as the absolute proprietor of a portion of the suit land.



- b. Whether the respondents are the registered owners in trust of the whole of the suit land for the applicant.
  - c. Whether the applicant is entitled to equitably share and benefit the whole of the suit land.
  - d. Whether the respondents should transfer the whole of the suit land to the applicant.
  - e. Whether the subsequent transfers affecting the suit land herein undertaken before the filing of this suit should be cancelled.
  - f. Whether in default of the respondents to transfer the suit land, the Deputy Registrar of the Court should execute all such documents as may be necessary for the registration of the applicant as proprietor of the entire suit land.
  - g. Whether the respondents should pay the costs of this originating summons.
9. Together with the Originating Summons, the applicant lodged an application by way of a notice of motion of even date seeking the following orders:
- a. Spent
  - b. Spent
  - c. That the Honourable court be pleased to issue an order of temporary injunction restraining the respondents, their agents, servants, employees and/or assigns from disposing of, alienating, transferring, leasing, occupying and/or in any other way interfering with any part of the suit land pending inter partes hearing and determination of the main suit.
  - d. That the Honourable court do issue an order directed to the Homa Bay County Land Registrar to cancel and/or expunge all the entries made in the register of the suit land and subsequently cancel the title deed issued to the 3<sup>rd</sup> respondent in respect to the suit land and the same to revert back to the estate of the deceased herein.
  - e. That the costs be in the cause.
10. The suit was opposed by way of the grounds of opposition as stated in paragraph 1 hereinabove. He urged the court to dismiss the same with costs.
11. It must be noted that a Preliminary Objection ought to be on a point of law; see *Mukisa Biscuits Manufacturing Ltd.* case (*supra*) where the Court of Appeal pronounced itself on what constitutes 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...” (Emphasis added).
12. I have considered the preliminary objection, the reply thereto and the rival submissions. Therefore, the issues that arise for determination are whether:
- a. Whether his court has jurisdiction to hear and determine this suit together with the application.
  - b. Whether the instant suit and the application are sub judice.



- c. Who bears the costs of the Preliminary Objection?
13. On the first issue, Article 162 (2) (b) of *Constitution* of Kenya, 2010 anchors the jurisdiction of this court. The same is operationalized by Section 13 (1) of the *Environment and Land Court Act*, 2015 [2012] and other relevant statutes.
14. The Court of Appeal at Nairobi in *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 others* [2013] eKLR, stated the following in respect to jurisdiction:
- “So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.”
15. The Honourable Court went ahead to quote Nyarangi J.A in *The Owners of the Motor Vessel Lillian S’v Caltex Kenya Ltd* [1989] KLR 1 that;
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”
16. In view of the foregoing, it is my considered view that the contested issues in the present suit and application as indicated in paragraphs 8 and 9 hereinabove, are well within the confines of the jurisdiction of this court as encapsulated under Section 13 of the *Environment and Land Court Act*, 2015 [2012].
17. Turning to the second issue, the interested party contends that this matter is sub judice as there is another suit filed at the Chief Magistrate’s Court in Homa Bay- Environment and Land Case No. E005 of 2024 over the same subject matter. However, the applicant’s counsel submitted that the issue of sub judice cannot be determined by way of a Preliminary Objection.
18. Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya 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.”
19. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, the Supreme Court of Kenya stated as follows:
- “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.

20. The applicant avers that she is not a party to the suit in Homa Bay Chief Magistrate's Court Environment and Land Case No. 5 of 2024. That although she was served with the pleadings relating to the same through her advocate, the defendant therein is one Jane Kasera and not herself.
21. I have had occasion to peruse the application made by the interested party herein in Homa Bay Chief Magistrate's Court Environment and Land Case No. 5 of 2024 and dated 7<sup>th</sup> January 2024. I note that the same relates to L. R. No. Kanyada Kotieno Katuma A/1180 which is the suit land in this case. The applicant is the interested party herein. Among the orders sought was a temporary injunction as against the respondent restraining her and her agents from interfering with the applicant's peaceful occupation and possession of the suit land. The applicant also sought that the respondent be ordered to give vacant possession of the suit land.
22. Notably, upon considering the application, the Honourable Magistrate (Hon. J. S. Wesonga - PM) issued the following orders on 1<sup>st</sup> March 2024:
  - a. That the status quo obtaining to be maintained.
  - b. That the Land Registrar Homa Bay and the Land Surveyor Homa Bay to visit and determine whether the respondent has encroached on the suit land and file their respective reports within 45 days.
  - c. That the survey costs shall be catered for by the plaintiff/applicant herein,
  - d. That security shall be provided by the Officer Commanding Police Station (OCS) Homa Bay.
  - e. That costs will be in the cause.
23. Clearly, the suit at the magistrate's court was instituted before the one in this court.
24. Guided by the decision of the Supreme Court of Kenya in *Kenya National Commission on Human Rights* case (*supra*) as well as Section 6 of the *Civil Procedure Act* (*supra*), I hereby direct that the suit before this Court be stayed until Homa Bay Chief Magistrate's Court Environment and Land Case No. E005 of 2024, is heard and determined.
25. The upshot is that the preliminary objection is merited and is hereby allowed with costs to the interested party.
26. Orders accordingly.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT HOMA BAY THIS 18TH DAY OF JULY 2024.**

**G. M. A ONGONDO**



## **JUDGE**

Present:

Kimberly instructed by L K Obwanda learned counsel for the plaintiff/applicant

T Luanga, court assistant

