



Lwambi & 2 others (The Petitioners Through Mbuyu Wa Chapa Community Water Kiosk CBO) v National Land Commission & 5 others (Environment & Land Petition E016 of 2023) [2024] KEELC 6150 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6150 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E016 OF 2023
NA MATHEKA, J
SEPTEMBER 25, 2024**

BETWEEN

**JUMAA LWAMBI 1ST PETITIONER
MWINYIKOMBO GOJAMA 2ND PETITIONER
MUNGA MURUU 3RD PETITIONER
THE PETITIONERS THROUGH MBUYU WA CHAPA COMMUNITY WATER
KIOSK CBO**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
SENIOR LAND REGISTRAR OF TITLES MOMBASA 2ND RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT
C.E.C MEMBER OF LANDS, PLANNING AND HOUSING ROSE
KANINI 4TH RESPONDENT
JUBILEE INVESTMENT TRUST 5TH RESPONDENT
MOMBASA INVESTMENT CORPORATION 6TH RESPONDENT**

RULING

1. The County Attorney raised a preliminary objection on the following grounds;
 1. That with due respect this Honourable Court lacks the requisite jurisdiction to hear and determine this Application and Petition in any manner in its original capacity.
 2. That the Application is inconsistent with Section 16 of the *Government Proceedings Act*.



3. That this matter is sub judice and there is a similar matter filed in the name and style as Mombasa Environment and Land Court Petition *No. E016 of 2023* — Jonathan Dzuya Saha & 45 others — versus — National Land Commission & 2 others.
 4. That the Application and Petition is inconsistent with Section 8, 9 and 14 of the Access to information *Act No. 31 of 2016*.
 5. That the instant Petition fails to meet the Constitutional threshold and fails to lay out provisions of *the Constitution* alleged to have been infringed, and how they have been infringed thus the Petition is defective and improperly before this Honourable Court as such there is no suit to support the Application.
 6. That the suit is fatally defective.
2. After careful consideration of the application and the notice of preliminary objection and the submission thereto I find that the only issues for determination is whether the notice of preliminary objection and application dated 2nd February 2024 has merit and who bears the costs?
 3. A notice of preliminary objection was discussed in *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 where their Lordships observed thus:

---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”.
 4. In the same case Sir Charles Newbold, P. stated:

a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
 5. In *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* (2015) eKLR the supreme court made the following observation as relates to Preliminary Objections:

... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
 6. I find that the issue of jurisdiction and sub judice is a question of law and I will consider the preliminary objection. 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.”

7. 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.

8. 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...”

9. I have taken the liberty to peruse the said file Mombasa Environment and Land Court *Petition No. E016 of 2023* Jonathan Dzuya Saha & 45 others vs National Land Commission & 2 others. That petition is dated 12th June 2023. I find that the parties are similar and so is the subject matter which is in Kwa Jomvu area at Mbuyu wa Chapa. On the 10th July 2024 the Kibunja J delivered a ruling striking out the petition for contravening the doctrine of exhaustion by approaching the court before the 1st Respondent that is NLC could pronounce itself on their pending claim. It is not clear in this current suit whether NLC had issued its report on the said claim. That the court’s jurisdiction had therefore been invoked prematurely and the preliminary objection was upheld. I notice the Advocate Mr. Tindi or the petitioners is the same in both matters. The instant petition is dated 13th December 2023 clearly after the ruling on July 2023 by the court. The correct procedure would have been for the petitioners to appeal against the ruling of Kibunja J and not file a fresh petition. I find that this is forum shopping and an abuse of the court process by the petitioners. I find that the petition and application are res judicata and strike them out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

